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Plaintiffs Entergy Vermont Yankee, LLC (“ENVY”) and Entergy Nuclear Operations, Inc. (“ENOI”) respectfully submit this memorandum of law in support of their motion for a preliminary injunction to preserve the status quo pending the conclusion of this litigation and to prohibit Defendants from forcing cessation of operations at the Vermont Yankee Nuclear Power Station (the “Vermont Yankee Station”).

Introduction

This case involves a challenge to Vermont’s attempted usurpation of federal authority over continued operation of the Vermont Yankee Station, which is operated by Plaintiff ENOI and owned by Plaintiff ENVY. The federal Nuclear Regulatory Commission (“NRC”), which has exclusive authority over nuclear power plant operation and safety, recently granted the Vermont Yankee Station a renewed license to operate through March 21, 2032. But the State of Vermont claims veto power over that federal judgment, thus turning the Supremacy Clause of the U.S. Constitution on its head.

By this motion, Plaintiffs seek a preliminary injunction preserving the status quo pending the conclusion of this litigation and prohibiting Defendants from taking any action that would force the Vermont Yankee Station to cease operations. Vermont’s plan to shut down the Vermont Yankee Station as of March 21, 2012 would inflict a variety of irreparable harms upon ENVY and ENOI. It is already causing attrition of highly trained employees. It would result in losses associated with fuel that must be fabricated in July 2011 and with refueling and maintenance that must be undertaken in or before October 2011. It would require ENVY and ENOI to file a certificate of decommissioning with the NRC that is likely irreversible, costing Plaintiffs twenty years’ worth of revenues.

Vermont's plan to shut down the Vermont Yankee Station would also severely and irreparably harm the public interest. For years, the Vermont Yankee Station has been providing safe, reliable, low-cost power to Vermont and New England. If the plant is shut down, jobs will be lost, electricity prices will rise, the power grid will become less reliable (both inside and outside Vermont), greenhouse gas emissions will increase, and Vermont's tax revenues will decline. By contrast, continued operation of the Vermont Yankee Station pending the resolution of this litigation will impose no significant costs on Defendants or the people of Vermont.

Plaintiffs satisfy each of the prerequisites to a preliminary injunction:

Plaintiffs are likely to prevail on the merits. The federal Atomic Energy Act ("AEA") and Nuclear Waste Policy Act ("NWPA") confer exclusive authority upon the federal government, specifically the NRC, in the fields of (a) the licensing and operation of an existing nuclear power plant, including storage of spent nuclear fuel; and (b) the regulation of any aspect of the radiological safety of a nuclear power plant. In flat contravention of that authoritative federal scheme, Vermont has purported to determine that the Vermont Yankee Station must be shut down on March 21, 2012. Vermont's regulatory actions are preempted for either of two independent reasons.

First, Vermont stands alone among the fifty States in asserting that an already operating and federally licensed nuclear power plant must also have a state license (which Vermont labels a "certificate of public good") in order to continue operations. In purporting to exercise authority to shut down a successfully operating nuclear power plant with an existing federal license extending to 2032, Vermont intrudes impermissibly upon the exclusive authority of the NRC over the licensing and operation of nuclear power plants.

Second, Vermont has repeatedly based its assertion of regulatory authority on radiological safety concerns despite the fact that such concerns are the exclusive province of the federal government. For example, Governor Peter Shumlin commented, in the wake of the NRC's approval of a renewal license, that "I don't think you can convince most Vermonters today ... that Vermont's best energy choice is to play Russian Roulette with an aging nuclear power plant." Decl. of Timothy A. Ngau dated Apr. 21, 2011 ("Ngau"), Ex. 1 (Bob Kinzel, *Yankee Owner Tries New Strategy To Win Over Vermonters*, VPR NEWS, Mar. 31, 2011). Nor does Vermont have any non-pretextual basis to justify its plan to shut down the Vermont Yankee Station as rooted in economic, reliability or environmental grounds rather than safety grounds. Even experts commissioned by Vermont have commended the reliability of the plant's operations: "Overall, many station managerial and technical areas meet or exceed industry standards for performance. The station is operated and maintained in a reliable manner." Ngau, Ex. 33 (Nuclear Safety Associates, *Reliability Assessment of the Vermont Yankee Nuclear Facility* (Dec. 22, 2008) (redacted public version)), at 2. And studies commissioned by Vermont and other authorities have found that shutdown of the Vermont Yankee Station would cause Vermont severe economic harms rather than benefits. Shutdown would cause significant job loss, higher electricity prices for Vermont consumers, more greenhouse gas emissions, and diminished local and state tax revenues. It would also have negative consequences for electricity retailers and consumers in other States, because the Vermont Yankee Station is a major wholesale seller of power to retail utilities not just in Vermont, but all across New England. Continued operation of the Vermont Yankee Station, by contrast, would generate significant economic benefit while posing no environmental concerns. For these and other reasons, Plaintiffs are likely to succeed on the merits of their claims.

Plaintiffs will suffer irreparable harm absent a preliminary injunction. The threatened shutdown of the Vermont Yankee Station is already inflicting harm upon Plaintiffs, as several highly skilled employees have recently quit their jobs, and more may do so. Other irreparable harm is on the immediate horizon, including Plaintiffs' need to decide by July 7, 2011 whether to fabricate fuel that is specific to Vermont Yankee Station to enable operation of the plant past March 21, 2012. And the ultimate irreparable harm will occur if Vermont succeeds in forcing Plaintiffs to shut down and begin decommissioning the plant on March 21, 2012, as Plaintiffs will be required by NRC regulation to file a written certification of the permanent cessation of operations, and there is no provision in the regulations for withdrawing such a certificate after it is filed nor any NRC precedent approving a plant's return to operation under such circumstances. In that event, Plaintiffs would lose the revenues from the additional 20 years of operation authorized by the NRC under the renewed license, and would have to bear the substantial costs of prematurely decommissioning the plant without any new revenue from operations.

The balance of hardships tips decidedly in favor of Plaintiffs. Plaintiffs and the public will suffer immediate and irreparable harm from a shutdown of the Vermont Yankee Station, and that harm would not be remedied by an ultimate ruling in Plaintiffs' favor on the merits. By contrast, the State of Vermont will suffer no harm (and indeed will benefit) from continued operation of the plant.

The public interest favors a preliminary injunction. The harm to the public interest from even a temporary shutdown of the Vermont Yankee Station would be significant, immediate, and irreparable. The Vermont Yankee Station employs over 600 people; has the capacity to produce over 600 MW of power each year (compared to the 52 MW capacity of the next largest generator in Vermont); supplies the equivalent of one-third of Vermont's power;

supplies power to utilities in other States in the New England region; and has paid taxes and other fees to Vermont of approximately \$13 million per year in recent years. According to ISO New England Inc. (“ISO-NE”), the entity responsible for maintaining the reliability of the New England power grid, there would be decreased reliability of the power grid for the entire region if the Vermont Yankee Station were shut down. And as Vermont’s own studies conclude, such a shutdown would cause increases in electricity prices (that would disproportionately harm the poorer residents of the State), substantial job losses at the Vermont Yankee Station and at companies facing higher electricity prices, diminished tax revenues, and increased greenhouse gas emissions from traditional power sources unless and until highly speculative sources of “green power” come online.

Accordingly, as explained in more detail below, this Court should grant a preliminary injunction against Defendants that preserves the status quo pending the conclusion of this litigation and that prohibits them from taking actions to shut down operation of the Vermont Yankee Station

Legal and Factual Background

A. The Parties And The Vermont Yankee Station.

Plaintiffs ENVY and ENOI are the owner and operator, respectively, of the Vermont Yankee Station, which is located in Vernon, Vermont. Compl. ¶¶ 1, 13; Decl. of John T. Herron dated Apr. 19, 2011 (“Herron”) ¶ 10. The Vermont Yankee Station is a merchant electric plant that sells all of the power it produces at wholesale to utilities in the interstate market; those utilities in turn sell the electricity at retail to end-users. Compl. ¶¶ 41, 48; Decl. of Edward D. Kee dated Apr. 21, 2011 (“Kee”) ¶¶ 16-17. The Vermont Yankee Station began operating in

1972 pursuant to a 40-year license issued by the Atomic Energy Commission, the predecessor of the NRC. Compl. ¶¶ 43, 49; Herron ¶ 12.

During its four decades of operation, the Vermont Yankee Station has provided substantial benefits to Vermont and the Vermont economy. Through its sales to Vermont utilities, the Vermont Yankee Station supplies the equivalent of approximately one-third of the baseload power consumed in the State. Compl. ¶ 45. The Vermont Yankee Station is one of the largest private employers in the State, directly employing over 600 personnel in many high-skilled technical positions and indirectly employing many others through its purchases from Vermont companies. *Id.* ¶ 44; Herron ¶ 18; Kee ¶ 39. ENVY pays considerable taxes and fees to the Vermont government: ENVY paid \$6.71 million in 2010 alone, and over \$100 million has been paid with respect to the Vermont Yankee Station since 1972. Kee ¶ 46 & Ex. 13 (Sarah Teachout, Vt. Legis. Joint Fiscal Office Issue Brief, Feb. 2011 Update, at Table 2).

Defendants James Volz, John Burke, and David Coen are the current members of the Public Service Board (“PSB”), which is an administrative agency of the State of Vermont. Compl. ¶ 19. The PSB is authorized by Vermont law to supervise the rates, quality of service, and overall financial management of Vermont’s public utilities. *Id.* ¶ 19; Vt. Stat. Ann. tit. 30. Defendant Peter Shumlin is the current Governor of Vermont. *Id.* ¶ 20. Defendant William Sorrell is the current Attorney General of the State of Vermont. *Id.* ¶ 21.

B. The Atomic Energy Act’s Preemptive Force.

Federal law centralizes authority to regulate nuclear power plants in the NRC, a federal administrative agency. Under the AEA, the NRC has exclusive jurisdiction to license and relicense the operation of nuclear power plants. While the NRC is authorized to delegate some authority over nuclear generating facilities to individual States (a delegation of authority

Vermont has never sought or obtained), it is prohibited from delegating any authority with respect to plant construction or operations:

No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of—(1) the construction and *operation* of any production or utilization facility or any uranium enrichment facility.

42 U.S.C. § 2021(c) (emphasis added). Similarly, the NRC has exclusive authority over licensing of spent nuclear fuel (“SNF”) storage facilities under the NWSA, 42 U.S.C. §§ 10101-10270. Pursuant to the AEA and the NWSA, “it is not the states but rather the NRC that is vested with the authority to decide under what conditions to license an SNF storage facility.” *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1250 (10th Cir. 2004), *cert. denied sub nom. Nielson v. Private Fuel Storage, LLC*, 546 U.S. 1060 (2005); *see also id.* at 1242 (“the Atomic Energy Commission and the NRC have promulgated detailed regulations regarding the operation of nuclear facilities, including the storage of SNF”).

As the seminal U.S. Supreme Court decision on preemption in the nuclear energy area makes clear, the grant of exclusive authority to the NRC over plant operation precludes state interference irrespective of the purpose of a state law. That decision upheld, as based on non-preempted reliability grounds, a California statute that barred construction of new nuclear power plants by local utilities pending the development of a permanent solution for storage of SNF, but made clear that a State may not bar the continued operation of an already existing plant, as Vermont attempts to do here:

[W]e emphasize that the statute does not seek to regulate the construction or operation of a nuclear powerplant. It would clearly be impermissible for California to attempt to do so, for such regulation, *even if enacted out of non-safety concerns*, would nevertheless directly conflict with NRC’s exclusive authority over plant construction and operation.

Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n, 461 U.S. 190, 212 (1983) (“PG&E”) (emphasis added).

As an additional and independent ground for preemption, the AEA precludes (through “field preemption”) any state regulation enacted or enforced for the impermissible purpose of the overseeing the radiological safety aspects of nuclear power generation. *See id.* at 212; *Pennsylvania v. Lockheed Martin Corp.*, No. 1:09-CV-0821, 2010 WL 456810, at *19 (M.D. Pa. Feb. 1, 2010) (“[T]he federal government occupies the field of nuclear safety entirely, and this field preemption is all encompassing where that [sic] state statute at issue involves nuclear safety. In other words, if a state statute was enacted with the purpose of protecting against radiation hazards ... it is preempted”) (quotation omitted); *Conn. Coalition Against Millstone v. Conn. Siting Council*, 942 A.2d 345, 357 (Conn. 2008) (“[A] decision by the council denying certification on the basis of environmental effects caused by radiation hazards actually would conflict with the NRC’s regulations expressly authorizing such facilities as a safe method of storing spent nuclear fuel.”).

Here, the federal government, through its license renewal proceeding, has determined that the Vermont Yankee Station is permitted to operate until March 21, 2032. Compl., Ex. A. The NRC’s authorization process, which began when ENVY and ENOI filed their renewal application on January 27, 2006, involved an extensive federal review, including a comprehensive environmental review under the National Environmental Policy Act, 42 U.S.C. § 4321, *et. seq.* On March 21, 2011, at the conclusion of this “thorough and extensive safety and environmental review of the application,” Ngau, Ex. 2 (Press Release, NRC, *NRC Will Renew Vermont Yankee Operating License For An Additional 20 Years* (Mar. 10, 2011)), NRC issued

the Vermont Yankee Station a renewal license authorizing operation of the Vermont Yankee Station through March 21, 2032. Compl., Ex. A.

C. Vermont's Assertion Of Regulatory Authority Over Operation Of The Vermont Yankee Station.

In 2002, the joint venture of Vermont utilities that originally built and operated the Vermont Yankee Station conducted an auction to sell the Vermont Yankee Station, and ENVY won the bidding. Compl. ¶ 51. Vermont's PSB asserted jurisdiction to approve the sale. *Id.* ¶¶ 51-52. Plaintiffs, in the interest of proceeding amicably with the State, cooperated with this process and entered into a Memorandum of Understanding ("MOU") with a separate Vermont agency, the Department of Public Service ("DPS"), the state executive agency that represents the public interest in energy-related matters. *Id.* ¶ 53; Ngau, Ex. 3 (Memorandum of Understanding between ENVY, Vermont Yankee Nuclear Power Corp., Central Vermont Public Service Corp., Green Mountain Power Corp., and Vt. DPS (Mar. 4, 2002)). Pursuant to the MOU, DPS agreed to support the sale and to allow ENVY to use the "SAFSTOR" method of decommissioning the Vermont Yankee Station in the event of a shutdown (rather than the more costly "DECON" method). ENVY in turn acknowledged the "jurisdiction" of the PSB under then "current law" to decide whether to grant or deny approval for continued plant operation after March 21, 2012, and agreed not to challenge that jurisdiction as federally preempted. Compl. ¶ 55; Ngau, Ex. 3 at 2-3, 6.

At the time the sale was approved in 2002, Vermont law prohibited construction of a facility for storage of SNF without a CPG granted by the General Assembly, *see* Vt. Stat. Ann. tit. 10, § 6501 *et seq.*, but granted a specific exemption to "any temporary storage by Vermont Yankee Nuclear Power Corporation of spent nuclear fuel elements or other radioactive waste at its present site." Vt. Stat. Ann. tit. 10, § 6505. In 2004, the Office of Vermont's Attorney

General issued an Opinion that this exemption was owner-specific, not site-specific, such that the Vermont Yankee Station, now owned by ENVY, did not come within the exemption. Letter from Office of the Attorney General to Peter Welch, President Pro Tempore of the Vermont Senate, 2004 WL 1737093, at *4 (Apr. 30, 2004). This development concerned Plaintiffs because the federal government was defaulting on its commitment to remove SNF from the site and existing SNF storage space was expected to reach full capacity in Fall 2008, making it urgent to construct new dry SNF storage. Ngau, Ex. 4 (Vt. Pub. Serv. Bd., Dkt. No. 7082, Order (Apr. 26, 2006)), at 4 & n.4.

Given Plaintiffs' need to obtain the General Assembly's approval for construction of new SNF storage, Plaintiffs acceded to an arrangement, enacted in Act 74 of the 2005-2006 legislative session, under which the General Assembly authorized the PSB to issue a CPG for the new SNF storage on condition that Plaintiffs return to the General Assembly for approval to store any SNF derived from post-March 21, 2012 operations. Act 74 (June 21, 2005), codified at Vt. Stat. Ann. tit. 10, § 6522.¹ Act 74 thus effectively required legislative approval for the Vermont Yankee Station's operation beyond the term of the CPG that the PSB had issued in 2002. Because the 2002 MOU had required only the approval of the PSB, the insertion of the General Assembly into the approval process fundamentally modified the MOU, for the PSB must issue reasoned decisions based on evidence and its expertise, subject to judicial review by the Vermont Supreme Court, while the General Assembly is a political body that may act for unsupported, unstated, or arbitrary reasons.

¹ After passage of Act 74, Plaintiffs petitioned the PSB for a CPG to build the new SNF storage, and such a CPG was granted in 2006, subject to the requirement in Act 74 that Plaintiffs obtain legislative approval before storing any SNF derived from post-March 21, 2012 operations. Ngau, Ex. 4.

In 2006, Vermont further, and even more directly, repudiated the MOU by taking from the PSB the authority to authorize post-2012 operation of the Vermont Yankee Station and instead granting that authority to the Vermont General Assembly. Under the 2006 Act, the PSB is prohibited from awarding a new CPG to the Vermont Yankee Station for operations after March 21, 2012 unless the General Assembly first “approves”:

No nuclear energy generating plant within this state may be operated beyond the date permitted in any certificate of public good granted pursuant to this title, including any certificate in force as of January 1, 2006, unless the general assembly approves and determines that the operation will promote the general welfare, and until the public service board issues a certificate of public good under this section. If the general assembly has not acted under this subsection by July 1, 2008, the board may commence proceedings under this section and under 10 V.S.A. chapter 157, relating to the storage of radioactive material, but may not issue a final order or certificate of public good until the general assembly determines that operation will promote the general welfare and grants approval for that operation.

Vt. Stat. Ann. tit. 30, § 248(e)(2). The 2006 Act explicitly references, as a factor relevant to the General Assembly’s determination whether to authorize the PSB to issue a CPG, “analysis of ... public health issues.” *Id.* § 254(b)(2)(B).²

Defendant Shumlin and other elected Vermont officials have made clear that they intend, under this state regulatory regime, to shut down operation of the Vermont Yankee Station as of

² To the extent Plaintiffs’ representatives made any positive statements about the 2006 Act, they must be viewed against the backdrop that, under the 2004 Attorney General Opinion, and then under the 2005 Act, Plaintiffs were already required to obtain legislative approval that had not been contemplated at the time of the 2002 MOU. Given those pre-2006 developments, Plaintiffs had an interest in seeking legislative approval only once. *See* Ngau, Ex. 5 (Louis Porter, *House to Streamline Vermont Yankee Process*, RUTLAND HERALD & TIMES ARGUS, Apr. 28, 2006) (“Entergy does not object to coming before lawmakers again before gaining permission to keep running, but the company does not want to make more than one trip to Montpelier, Spokesman Brian Cosgrove said.”); Ngau, Ex. 6 (*Douglas Signs Bill Giving Lawmakers Say in Nuke’s Future*, RUTLAND HERALD & TIMES ARGUS, May 21, 2006) (reporting that Plaintiffs’ spokesman stated that the law “sets out a process that isn’t overly complicated”).

March 21, 2012, for reasons of radiological safety. For example, in the wake of the NRC's recent announcement that it was granting the 20-year license renewal to the Vermont Yankee Station, Governor Shumlin stated: "Given the serious radioactive tritium leaks and the recent tritium test results, the source of which has yet to be determined, and other almost weekly problems occurring at this facility, I remain convinced that it is not in the public good for the plant to remain open beyond its scheduled closing in 2012." Ngau, Ex. 7 (*Vt. Yankee Gets Federal License Renewal*, TIMES ARGUS (Montpelier-Barre, Vt.), Mar. 11, 2011).

Vermont officials have also indicated that, to the extent the Vermont General Assembly considers authorizing the PSB to issue a new CPG, it will condition such action on ENVY agreeing to sell power to Vermont utilities at rates below those authorized by the Federal Energy Regulatory Commission ("FERC") for the interstate wholesale market into which ENVY sells it power.³

On February 23, 2010, the Vermont Senate considered several measures that would have permitted the PSB to move ahead with deciding whether to issue a new CPG for the Vermont Yankee Station. Compl. ¶ 79. Each of these measures was defeated. *Id.*

The PSB has been holding hearings and collecting evidence that could be relevant to its determination whether to issue a CPG, should the General Assembly authorize it to do so, and numerous studies commissioned by Vermont have explained that the State will suffer negative effects if the plant is shut down. Kee ¶ 36; Kee, Exs. 6-7, 9-14. Under the 2006 Act, however,

³ See, e.g., Ngau, Ex. 8 (Stephanie Kraft, *Vermont, ENVY Square Off*, VALLEY ADVOCATE (Northampton, Mass.), Jan. 22, 2009) (quoting then-Vermont Senate President, and now Governor, Peter Shumlin as saying, "There's no way we're going to vote to re-license the plant unless Vermonters are getting a great deal."); see also Ngau, Ex. 9 (Letter from Sen. Peter Shumlin and Rep. Shapleigh Smith to Jay Thayer, ENVY (Feb. 9, 2009)) ("Accordingly, if ENVY and ENO are unable ... to provide the General Assembly with a power purchase agreement between the parties, it will be nearly impossible for the legislature to make a judgment on the continued operation of the plant before we adjourn").

the PSB may not issue the CPG without legislative approval, and such approval appears unforthcoming. Vermont's congressional delegation, for example, assumed that the State would succeed in shutting down the Vermont Yankee Station when it recently wrote to the NRC Chairman to request that, *upon shutdown* on March 21, 2012, ENVY should be required to employ the "DECON" decommissioning method rather than the far less costly "SAFSTOR" method that is authorized by federal law and that Vermont explicitly agreed in the 2002 MOU that ENVY could use in the event of a shutdown. Ngau, Ex. 10 (Letter from Sen. Patrick Leahy, Sen. Bernard Sanders, and Rep. Peter Welch, members of Vermont's congressional delegation, to Gregory B. Jaczko, Chairman of the NRC (Feb. 28, 2011)).

Argument

A party seeking a preliminary injunction must show "(a) irreparable harm and (b) either (1) likelihood of success on the merits *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.'" *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (quoting *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979)) (emphasis added); *see also id.* at 38 (holding that this standard has not been altered by Supreme Court precedent). Where there is a "serious question" going to the merits, a district court may grant a preliminary injunction even if it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims, so long as "the balance of hardships tips decidedly" in the

movant's favor. *See, e.g., F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 597 F.2d 814, 815-19 (2d Cir. 1979) (*per curiam*).⁴

As explained below, Plaintiffs are likely to succeed on the merits (and *a fortiori* can demonstrate serious questions on the merits); Plaintiffs face irreparable harm absent a preliminary injunction; Plaintiffs will endure substantially more hardship if a preliminary injunction is not granted than Defendants will endure if a preliminary injunction is granted; and the public interest favors granting a preliminary injunction.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

A. Plaintiffs Are Likely To Succeed On Their Claim That The Challenged Vermont Laws Are Preempted Under The Atomic Energy Act And Nuclear Waste Policy Act.

Plaintiffs are likely to succeed on either of two independent bases for finding Vermont's effort to assert control over the operation and safety of the Vermont Yankee Station preempted by the AEA and NWSA—whether exercised by the PSB alone as before the 2006 Act, or by the PSB and the Vermont legislature after that Act. *First*, the AEA and NWSA preempt a state from shutting down, particularly through a purported state licensing requirement, an already constructed and operational nuclear power plant that, like the Vermont Yankee Station, has been

⁴ To be sure, the Second Circuit has held that the “serious question going to the merits” prong is unavailable in cases where an injunction is sought against governmental action that is purportedly taken in the public interest. *See, e.g., Cnty. of Nassau v. Levitt*, 524 F.3d 408, 414 (2d Cir. 2008). With one exception, however, those published decisions have not involved a situation where the movant claims, as here, that a state or local governmental action is preempted by a federal governmental power. In the one exception, *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152 (2d Cir. 2010), the Court assumed without discussion that the “serious question going to the merits” prong was unavailable, *id.* at 156, but this statement was *dicta* because the Court found that the more demanding prong of “likelihood of success on the merits” was satisfied, *id.* at 158.

licensed by the NRC. *Second*, the AEA preempts a state from regulating any aspect of nuclear power based on safety concerns.

1. Vermont Is Preempted From Shutting Down The Operation Of An Existing, Federally Licensed Nuclear Power Plant.

In *PG&E*, the Supreme Court’s seminal decision on AEA preemption, the Court acknowledged the NRC’s exclusive authority over nuclear power plant operation. There, the Court upheld against preemption challenge a California statute barring construction of *new* nuclear power plants by local utilities until California’s Energy Commission “finds that there has been developed and that the United States through its authorized agency has approved and there exists a demonstrated technology or means for the disposal of high-level nuclear waste.” 461 U.S. at 198 (quotation omitted). But the Court distinguished between a State’s regulation of the development of *new* nuclear power plants by local utilities, as in the California statute, and a State’s regulation, as here, of the operation of an *existing* nuclear power plant:

At the outset, we emphasize that the statute does not seek to regulate the construction or operation of a nuclear powerplant. It would clearly be impermissible for California to attempt to do so, for such regulation, *even if enacted out of non-safety concerns*, would nevertheless directly conflict with the NRC’s exclusive authority over plant construction and operation.

Id. at 212 (emphasis added). The Court reiterated the distinction between new and existing nuclear power plants in its recognition that “the states have been allowed to retain authority over the need for electrical generating facilities [which is] easily sufficient to permit a state so inclined to halt the construction of *new nuclear plants* by refusing on economic grounds to issue certificates of public convenience in individual proceedings.” *Id.* at 216 (emphasis added); *see also id.* at 222 (“Congress has allowed the States to determine—as a matter of economics—whether a nuclear plant vis-à-vis a fossil fuel plant *should be built.*”) (emphasis added).

Although the Supreme Court in *PG&E* did not have occasion to apply its rule to a nuclear plant that was operating or was being constructed (because the California statute at issue concerned plants as to which construction had not yet commenced), the Second Circuit has done so in the context of a plant, Shoreham, whose construction was nearly complete. In *County of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52 (2d Cir. 1984), the Second Circuit addressed an effort by Suffolk County to require “an independent physical inspection of Shoreham and an injunction against commencement of Shoreham’s operation pending final disposition of [the county’s suit].” *Id.* at 59. The Circuit held that “[t]o grant either of these actions would plainly intrude on areas of exclusive NRC jurisdiction” because, “[p]ursuant to 42 U.S.C. § 2021(c)(1), the NRC retains responsibility to regulate ‘the construction and operation of any production or utilization facility.’” *Id.* (quoting 42 U.S.C. § 2021(c)(1)). The Circuit further explained that, under *PG&E*, “a court ordered inspection, whether it be for safety or non-safety purposes, would obviously invade the NRC’s exclusive regulatory province ... [and] *an injunction that even temporarily shuts down the Shoreham facility would infringe on the NRC’s authority over construction and operation.*” *Id.* at 60 (emphasis added).

In a subsequent litigation over the Shoreham plant, the district court granted a preliminary injunction against enforcement of a Suffolk County statute criminally proscribing a federally required test of the plant’s emergency preparedness; in doing so, the court again emphasized the distinction between a state’s authority over whether to commence construction of a new nuclear power plant and a state’s authority over operation of a completed nuclear power plant:

The California statute at issue in *Pacific Gas & Electric* bears little resemblance to the statute under consideration here.... *Pacific Gas & Electric* dealt with pre-construction regulation of nuclear power plants and the disposal of nuclear by-products. In this case, by

contrast, the County is opposing a federally-sponsored test of LILCO's RERP [*i.e.*, radiological emergency response plan] after the Shoreham facility has been completed. The pre-construction moratorium litigated in *Pacific Gas & Electric* fell within the state sphere of authority.

Long Island Lighting Co. v. Cnty. of Suffolk, 628 F. Supp. 654, 666 (E.D.N.Y. 1986).

The *Long Island Lighting Company* decisions apply *a fortiori* here because the Vermont Yankee Station not only has been constructed, but has been operating for almost forty years. For good reason, no State has ever attempted, as Vermont has done here, to shut down an already-operating nuclear power plant that has a NRC license—particularly through a purported requirement that the plant obtain a state license in addition to its NRC license. *See* Ngau, Ex. 11 (Sharif Abdel Kouddous, *Vermont Gov. Fights to Close Vermont Yankee*, DEMOCRACY NOW!, Mar. 15, 2011) (quoting Governor Shumlin as stating: “We’re the only state in the country that’s taken power into our own hands and said that, without an affirmative vote from the state legislature, the Public Service Board cannot issue a certificate of public good to legally operate a plant for another 20 years. Now, the Senate has spoken, 26 to four, saying, no, it’s not in Vermont’s best interest to run an aging, leaking nuclear power plant.”); Ngau, Ex. 12 (Alan Wirzbicki, *Vermont’s Unique Nuclear Power Veto*, BOSTON GLOBE, Mar. 23, 2011) (similar).

Courts addressing such attempts in other contexts have routinely found them preempted. *See, e.g., Sperry v. Fla. ex rel. Fla. Bar*, 373 U.S. 379, 385 (1963) (“A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give the State’s licensing board a virtual power of review over the federal determination”) (quotation omitted); *Young v. Coloma-Agaran*, 340 F.3d 1053, 1057 (9th Cir. 2003) (holding preempted a state law that “completely exclude[d] the plaintiffs from conducting their federally-licensed tour boat businesses”).

Plaintiffs thus are likely to succeed on their argument that Vermont's unprecedented regulatory approach is preempted by the AEA. Similarly, to the extent Vermont seeks effectively to shut down the plant by denying it a state license to store SNF derived from post-March 21, 2012 operations, Vermont's action is preempted by both the AEA and the NWPA. *See Skull Valley Band*, 376 F.3d at 1250 ("Under the federal licensing scheme ..., it is not the states but rather the NRC that is vested with the authority to decide under what conditions to license an SNF storage facility.").⁵

2. Vermont Is Preempted From Shutting Down A Nuclear Power Plant Based On Radiological Safety Concerns.

A second and independent basis for likelihood of success on the merits of the AEA preemption claim is *PG&E*'s holding that "the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." 461 U.S. at 212.⁶ Vermont's attempt to regulate the radiological safety of a nuclear power plant is thus preempted whether or not "it conflicts with federal law." *Id.* The Court further explained that, under this field preemption analysis, "it is necessary to determine whether there is a non-safety rationale" for the state's statute or regulation. *Id.* at 213.

⁵ The facts of *PG&E* were different from those in *Skull Valley Band* or the instant case because neither construction nor operation of the plant(s) had yet commenced in *PG&E*. Accordingly, the State's traditional authority over what type of power generation to develop, which in *PG&E* allowed California to decide against pursuing new nuclear power plants because of economic concerns regarding the storage of SNF, did not apply in *Skull Valley Band*, where the nuclear power was already underway and the question was how to treat SNF (a question that, under the AEA and NWPA, is exclusively within the federal government's province).

⁶ The exceptions are "the opportunity to enter into agreements with the NRC under [AEA] § 274(c)"; regulation of "radioactive air pollutants from nuclear plants [under the] Clean Air Act Amendments of 1977, § 122"; and imposition of "certain siting and land-use requirements for nuclear plants." *PG&E*, 461 U.S. at 212 n.25. The first exception is inapplicable because Vermont is not an "agreement" state, and the second two exceptions are likewise inapplicable here.

In *PG&E*, unlike here, there was such a non-safety rationale because California contemporaneously justified its statute by stating that, “[w]ithout a permanent means of disposal [of SNF], the nuclear waste problem could become critical leading to unpredictably high costs to contain the problem or, worse, shutdowns in reactors.” *Id.* at 213-14. California took care specifically to explain that “[w]aste disposal *safety* ... is not directly addressed by the bills, which ask only that a method [of waste disposal] be chosen and accepted by the federal government.” *Id.* at 214 (emphasis and second alteration in original).

By contrast, where other state or local regulations have sought to regulate nuclear power plants for reasons of radiological safety, lower courts in cases since *PG&E* have not hesitated to find those efforts preempted. In *Long Island Lighting Company*, for example, the Second Circuit held that the County’s lawsuit seeking to halt operations of a nuclear plant was preempted because the complaint “appears, at least in some respects, to be motivated by safety concerns ... [insofar as] some paragraphs specifically refer to the ill effects defendants’ alleged misdeeds might have on the public health, safety and welfare.” 728 F.2d at 59. In the other *Long Island Lighting Company* case before the Eastern District of New York, the court found that prior efforts by the county to assert safety concerns supported the inference (for purposes of the company’s pursuit of a preliminary injunction) that the County’s current legislation, which did *not* specifically mention safety, was nevertheless motivated by safety concerns. 628 F. Supp. at 665-66; *see also, e.g., Me. Yankee Atomic Power Co. v. Me. Pub. Util. Comm’n*, 581 A.2d 799, 806 (Me. 1990) (state statute preempted because it invoked “public health” and “safety” as legislative purposes); *Skull Valley Band*, 376 F.3d at 1246 (holding similar state statutes preempted and also noting that, “unlike the state officials in *Pacific Gas*, the Utah officials here

have failed to offer evidence that the provision allowing a county to ban SNF transportation and storage is supported by a non-safety rationale”).

Similarly here, the statutory text, the statements of legislators, and the records of administrative proceedings confirm that Vermont’s regulatory approach is motivated impermissibly by safety concerns. The 2006 Act, in re-allocating authority to issue a CPG from the PSB to the General Assembly, explicitly requires that “public health issues” be included in studies informing the legislature’s future decision whether to authorize the PSB to issue a CPG. Vt. Stat. Ann. tit. 30, § 254(b)(2)(B); *see also id.* § 254(c) (in acting on a petition for a CPG, PSB must consider “the general and specific issues that the studies are required to address”). The 2008 Act likewise expressly mentions “safety” in requiring an audit that will address the question: “Have any repairs, maintenance, or modifications impacted the original design of the redundant safety systems? Are all systems still ‘single failure proof?’” 2008 Vt. Acts & Resolves No. 189, § 4(10).⁷

Vermont officials have frequently explained these regulatory measures as motivated by concerns that the Vermont Yankee Station is unsafe. For example, just after the NRC announced that it would renew the Vermont Yankee Station’s federal license through March 21, 2032, Governor Shumlin stated: ““Given the serious radioactive tritium leaks and the recent tritium test results, the source of which has yet to be determined, and other almost weekly problems occurring at this facility, I remain convinced that it is not in the public good for the plant to remain open beyond its scheduled closing in 2012.” Ngau, Ex. 7; *see also* Ngau, Ex. 1 (“I don’t

⁷ Such mentions of “safety” would likely be even more prevalent in the statutory text and elsewhere had the legislators not been warned by a law professor from Vermont Law School that “it would not be wise to rely on [safety]” for fear of triggering AEA preemption. Entergy Nuclear/Vermont Yankee – Legislative Briefing, http://www.leg.state.vt.us/jfo/vt_yankee_video.aspx (Part 2 Video at 1:04:20) (Nov. 19, 2008).

think you can convince most Vermonters today ... that Vermont's best energy choice is to play Russian Roulette with an aging nuclear power plant."); Ngau, Ex. 13 (Bob Audette, *Vt. Legislators Seek Radiation Rule Review*, BRATTLEBORO REFORMER, Nov. 14, 2008) (quoting then-President Pro Tempore Peter Shumlin as saying that "[s]afety is our top concern").⁸

Vermont may attempt to distance itself from these safety-focused statements and to propose a *post hoc* non-safety rationale. Although it is Vermont's, not Plaintiffs', burden to articulate and justify a non-safety rationale, *see Skull Valley Band*, 376 F.3d at 1246 ("[T]he Utah officials here have failed to offer evidence that the provision ... is supported by a non-safety rationale."), any such rationale is unsupportable and thus should be viewed as a pretext for Vermont's true safety motivation.

To begin with, Vermont cannot plausibly assert a non-safety economic justification for shutting down the Vermont Yankee Station as Vermont has no "traditional" sphere of utility-

⁸ The Governor's reaction to the tritium leak, and his focus on preempted safety issues, is also made clear by his statements six months earlier, as a political candidate, that "I have been saying for some time that the radioactive leaks at Vermont Yankee could be the largest man-made environmental crisis that Vermont has ever seen Unless Entergy Louisiana is held accountable for this disaster, it could cost Vermonters millions of dollars and put the health and safety of thousands at risk." Ngau, Ex. 14 (*Yankee Becomes Big Issue in Governor's Race; Shumlin Addresses Leaks*, TIMES ARGUS (Montpelier-Barre, Vt.), Oct. 11, 2010). Other public statements reinforce the fact that Vermont officials' attempts to regulate the Vermont Yankee Station are motivated by safety concerns. In connection with Vermont's attempt to regulate the Vermont Yankee Station's storage of SNF, then-Senate President Peter Welch, D-Windsor, stated that "[t]he first concern of the Legislature is safety and safety is not for sale." Ngau Ex. 15 (*PSB Asked to Hold off on Yankee Ruling*, Times Argus (Montpelier-Barre, Vt.), Mar. 10, 2005). Similarly, when Vermont ultimately did "allow" the Vermont Yankee station to apply to the state legislature for permission to store SNF on-site, Mr. Welch commented that "[w]e took very, very seriously this question of safety Safety is not for sale; it cannot be for sale." Ngau, Ex. 16 (Louis Porter, *Yankee 'Dry Cask' Bill Is Approved in Senate*, TIMES ARGUS (Montpelier-Barre, Vt.), June 4, 2005). Discussing the Senate bill that would ultimately become Act 160, Representative Steve Darrow, D-Dummerston and Representative Sarah Edwards, P-Brattleboro, wrote an op-ed article stating that the law would allow for studies that would include examination of "[l]ong-term environmental, economic and *public health risks* related to dry cask storage and decommissioning options." Ngau, Ex. 17 (*Bill Sets Stage for Public Debate on Yankee*, TIMES ARGUS (Montpelier-Barre, Vt.), May 28, 2006) (emphasis added).

related authority over the Vermont Yankee Station as did California over the local retail utilities regulated by the statute at issue in *PG&E* or as New York did in the *Long Island Lighting Company* cases.⁹ That is because, unlike local utilities traditionally regulated by state governments, the Vermont Yankee Station is not a local retail utility that supplies electricity to consumers, but rather a supplier of power to the wholesale interstate market. Compl. ¶¶ 11, 41, 48; Kee ¶¶ 16, 18. As *PG&E* explained, the “economic aspects of electrical generation have been regulated for many years and in great detail by the states,” but subject to the important “exception of the broad authority of [FERC] over the need for and pricing of electrical power transmitted in interstate commerce.” 461 U.S. at 205-06 (citations omitted).

Any economic justification Vermont might offer to regulate a wholesale power generator, as opposed to a retail utility, is thus precluded by federal law, which has deregulated electricity generation and centralized wholesale rate-making authority in FERC since *PG&E* was decided. See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services By Public Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), *aff’d sub nom. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 681 (D.C. Cir. 2000) (*per curiam*), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002). “When combined with federal preemption law, one crucial aspect of these energy market regulatory reforms has been ‘a massive shift in regulatory jurisdiction from the states to FERC.’” *Pub. Util. Dist. No. 1 of Snohomish Cty. Wash. v. FERC*, 471 F.3d 1053, 1066 (9th Cir. 2006), *vacated on other grounds*, 547 F.3d 1081 (9th Cir. 2008); *see also id.* at 1067 (“Although state regulators formerly took an

⁹ Plaintiffs do not contend that the AEA preempts generally applicable state laws in traditional areas like tax law and tort law so long as such laws do not have a “direct and substantial effect” on nuclear plants. *English v. Gen. Elec. Co.*, 496 U.S. 72, 85 (1990).

extremely active role so as to ensure the just and reasonable retail power rates, FERC has exclusive jurisdiction over the wholesale rates that now drive the electric power market”).

Moreover, even if Vermont did have some traditional utility-related authority to regulate the Vermont Yankee Station (it does not), its efforts are preempted because any non-safety rationale that Vermont might assert is so implausible as to be necessarily pretextual for safety-related concerns, especially when viewed in conjunction with the explicit statements by Vermont legislators and its current governor invoking safety as a motivating rationale. That is because a shutdown of the Vermont Yankee Station would have negative, not beneficial, economic effects on Vermont and the surrounding region. As Vermont’s own former Governor Douglas stated in 2009:

[W]e must not lose sight of the fact that Vermont Yankee provides a source of power with relatively low carbon emissions ... and it currently provides approximately one-third of the state’s power. ... Vermont Yankee supports the region with over 600 high paying jobs, helping to infuse money into the local, state and regional economies, as well as additional tax revenue for the state. The Clean Energy Development Fund receives millions of dollars each year from Entergy to fund renewable projects throughout the state. In addition to local impacts, Vermont Yankee is responsible for providing power to neighboring states through the regional grid.

Ngau, Ex. 18 (Letter from Gov. James H. Douglas, Governor of the State of Vermont, to Hon. Donald G. Milne, Clerk of the Vermont House of Representatives (May 22, 2009)), at 3-4. More specifically, studies commissioned by Vermont itself have found that the economic and environmental impacts of shutting down the Vermont Yankee Station in March 2012 would be negative and substantial. ISO-NE has reached similar conclusions about the negative effects a shutdown would have on other surrounding States.

As explained in more detail in Points II-IV, *infra*, these negative economic and environmental effects would include:

Higher electricity prices in Vermont. According to a March 2010 report commissioned by the Vermont General Assembly, shutdown of the Vermont Yankee Station will lead to higher retail power costs in Vermont relative to a “Green” scenario in which Vermont simultaneously and aggressively promotes green power sources to replace the more than 600 MW capacity of the Vermont Yankee Station. “Retail power bills in the Green scenario are generally higher than most other scenarios in the initial 5+ years.” Kee, Ex. 9 (Econ. & Policy Res., Inc. *et al.*, *Consensus Economic and Fiscal Impact Analyses Associated with the Future of the Vermont Yankee Power Plant—Executive Summary* (March 2010) (“Consensus Study”)), at 10; *see also* Kee ¶¶ 47-62.

Increased unreliability of electricity supply. The Vermont Yankee Station does not sell its power directly to Vermont retail consumers, but rather sells the power into the interstate wholesale market, in which utilities purchase the power and then sell it at retail to end users. ISO-NE recently found that “potential thermal overloads and voltage violations ... generally (but not always) tend to be more widespread and severe without Vermont Yankee.” Kee, Ex. 23 (ISO-NE, *Summary of Vermont/New Hampshire Transmission System 2010 Needs Assessment*, Feb. 17, 2011), at 3; *see also* Kee ¶¶ 63-69 (discussing out-of-state impacts of closing the Vermont Yankee Station), ¶ 69 (discussing ISO-NE’s briefing of the Vermont Senate on the “overloads” in Massachusetts and New Hampshire that would follow from closing the Vermont Yankee Station).

Substantial job loss. The Consensus Study compares scenarios with and without the Vermont Yankee Station in future years and finds that there will be approximately 1,000 fewer

jobs without the Vermont Yankee Station, as well as additional “[s]econdary indirect and induced economic impacts” in terms of jobs in the community that serve the current employees of the Vermont Yankee Station. Kee, Ex. 9 at 8, 10.¹⁰ Although the report predicts that, if Vermont simultaneously adopts aggressive policies promoting green power, new jobs would be created to replace the lost jobs, *id.* at 10, that prediction is speculative and in any event contemplates job losses between 2015 and 2020 as compared to a scenario in which the Vermont Yankee Station continues to operate, *id.* at 9. A study commissioned by Vermont’s own DPS concerning the proposed CPG to allow operation of the Vermont Yankee Station for an additional 20 years estimates that that between 1,064.9 and 1,844.2 full-time job equivalents per year (averaged over the 20 year license renewal period) would be gained if the Vermont Yankee Station operated during the license renewal period. Kee, Ex. 7 (GDS Assocs., Inc., *Report to the Vermont Department of Public Service on the Vermont Yankee License Renewal* (Feb. 27, 2009) (“GDS Study”)), at 11-4 & 11-5; *see also* Kee ¶¶ 38-41 (concluding that closure of the Vermont Yankee Station would result in a significant loss of jobs).

Decline in state and local tax revenues. In 2009, taxes and fees paid to Vermont on account of the Vermont Yankee Station totaled approximately \$13.4 million; in 2010, \$13.8 million. *See* Kee, Ex. 13 at Table 2. With the plant shut down, this amount will drop to zero in 2013. *Id.* Although Vermont’s state and local governments provide certain services to the Vermont Yankee Station whose cost might be avoided were the plant shut down, these cost savings do not nearly offset the loss in state and local tax revenues from the Vermont Yankee Station. *See* Kee ¶ 43 & Ex. 7 at 11-12. The GDS Study further estimated that the positive economic impact of continued operation of the Vermont Yankee Station for the license renewal

¹⁰ This number of lost jobs appears to include the over 600 current employees at the Vermont Yankee Station. *See* Herron ¶ 18.

period would be an annual average of between \$76.5 million per year and \$255.1 million per year over the period from 2012 to 2032. Kee, Ex. 7 at 11-4; *see also* Kee ¶¶ 42-46 (compiling data regarding decreased revenue for Vermont from the early closure of the Vermont Yankee Station).

Increase in greenhouse gas emissions. As Governor Douglas explained, “Vermont Yankee provides a source of power with relatively low carbon emissions, thus helping to limit our greenhouse gas emissions.” Ngau, Ex. 18 at 2. If the Vermont Yankee Station is shut down, the gap in supply will have to be filled with fossil fuel sources, resulting in substantially higher greenhouse gas emissions. Kee, Ex. 10 (Howard J. Axelrod, Energy Strategies, Inc., *An Independent Assessment of the Environmental and Economic Impacts Associated with the Closing of the Vermont Yankee Nuclear Plant* (Mar. 13, 2009 update)), at 21. Although it is possible that non-nuclear green power sources will *eventually* bridge the gap, that will occur (if at all) only years in the future. *See, e.g.* Kee ¶¶ 74-77 (compiling studies on the effect on greenhouse gas emissions of a shutdown of the Vermont Yankee Station).

In short, no non-safety rationale that Vermont might assert is plausible. This provides strong corroboration of the explicit statements by Vermont’s officials that their intended shutdown of the Vermont Yankee Station is motivated by impermissibly preempted safety concerns. Accordingly, Plaintiffs are likely to succeed on this second, independent ground for AEA preemption.

3. ENVY Has Not Waived Its Right To Assert Federal Preemption Under The 2002 MOU.

Defendants might argue that Plaintiffs are precluded by paragraph 12 of the 2002 MOU from asserting that federal law preempts Vermont’s efforts to shut down an operating, federally licensed nuclear power plant. *See supra*, at 8-9 (describing the 2002 MOU). This argument

fails, however, because any such waiver is inapplicable in current circumstances. Moreover, Vermont has breached its own commitments under the MOU so as to release ENVY from any purported waiver of its ability to raise preemption. *See Rioux v. Ryegate Brick Co.*, 47 A. 406, 408 (Vt. 1900) (“[A]s the defendants’ breach went to the essence of the contract, it operated as an external condition subsequent, and entitled the plaintiff to be discharged from further performance on its part.”); *Brown v. Windham Ne. Supervisory Union*, No. 2:05-CV-329, 2006 WL 2548198, at *6 (D. Vt. Aug. 31, 2006) (“A breach of contract by one party may entitle the other party to be discharged from further performance.”). Here, as previously, Vermont has “attempt[ed] to go back on its commitments.” Ngau, Ex. 18.¹¹

Specifically, the MOU does not preclude Plaintiffs from asserting the preemption claims in this lawsuit, because:

First, the 2002 MOU provides that ENVY “waive[s] any claim ... that federal law preempts the jurisdiction of the [*Public Service*] Board to take the actions and impose the conditions agreed upon in this paragraph to renew, amend or extend the [CPG] to allow operation of the [Vermont Yankee Station] after March 21, 2012, or to decline to so renew, amend or extend.” Ngau, Ex. 3 at 6 (emphasis added). As the italicized words make clear, the MOU was expressly premised on the assumption that it was the PSB and not the General Assembly that would make the renewal decision. But in the 2005 and 2006 Acts, Vermont took the renewal decision away from the PSB, an administrative agency, and instead placed it in the hands of the Vermont General Assembly—a political body with no technical expertise or

¹¹ As an additional example, the MOU provides that demonstration of ENVY’s and ENOI’s ability to fund decommissioning “may include the implementation of SAFESTOR [sic] or other forms of delayed decommissioning,” Ngau, Ex. 3 at 5, but Vermont’s federal Congressional delegation recently urged that, in the event of a shutdown, ENVY and ENOI be required to employ the DECON (immediate decommissioning) method, which is substantially more costly than the SAFSTOR method. Ngau, Ex. 10.

experience making technical decisions in the field. This re-allocation of power fundamentally alters the agreement made in the MOU. The PSB has “the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction,” Vt. Stat. Ann. tit. 30, § 9; the PSB has expertise in matters of electricity and power generation; the PSB holds hearings and takes evidence; and the PSB’s decisions may be appealed to the Vermont Supreme Court, *id.* § 14, even if they are reviewed with some level of deference, *see, e.g., In re UPC Vt. Wind, LLC*, 969 A.2d 144, 147 (Vt. 2009). By contrast, the Vermont General Assembly must deal with a wide range of issues beyond state energy policy during legislative sessions spanning only a few months, and thus its members are constrained in their ability to master the complex issues associated with nuclear power. Moreover, the General Assembly is a purely political body that could deprive ENVY and ENOI of the authority to operate the Vermont Yankee Station for unsupported, unstated, or arbitrary reasons. ENVY and ENOI never consented to forego a preemption challenge to the purported jurisdiction of the General Assembly, as opposed to the PSB, to shut down an operating and federally licensed nuclear power plant.

Second, Paragraph 12 of the MOU could not reasonably have been intended to preclude the assertion of all preemption claims by Plaintiffs. As the PSB itself explicitly acknowledged in its order approving the sale of the Vermont Yankee Station to ENVY, the PSB is preempted from exercising authority in those areas “within the purview of the Nuclear Regulatory Commission,” Ngau, Ex. 20 (Vt. Pub. Serv. Bd., Dkt. No. 6545, Order (June 13, 2002)), at 15 n.25, and its authority was “limited to issues associated with the manner in which Vermont meets its energy needs,” *id.* at 118, 128. Moreover, Vermont’s DPS, which sought that provision, was a party to another case in which the PSB, shortly before the 2002 MOU’s execution, had stated that, where its scope of authority was limited by federal law, its “jurisdiction cannot be created

by contract or waiver.” Ngau, Ex. 19 (Vt. Pub. Serv. Bd., Dkt. No. 6270, Order re: Mot. for Decl. of Bd. Jurisdiction (Sept. 18, 2001)), at 46-47.¹² The most that the DPS and the PSB could have understood Paragraph 12 to accomplish is a waiver of a claim that federal preemption completely divests the PSB of any CPG jurisdiction if Plaintiffs sought to operate the Vermont Yankee Station beyond March 21, 2012.¹³

Third, the parties could not reasonably have expected, at the time that they signed the MOU, that the PSB or other Vermont authorities would attempt to regulate the Vermont Yankee Station based upon radiological safety concerns that are exclusively the province of the federal NRC under the AEA. In the PSB’s order approving the sale of the Vermont Yankee Station to ENVY, the PSB recognized that, under *PG&E*, “the Atomic Energy Act preempts state jurisdiction as to the ‘radiological safety aspects involved in the construction or operation of a nuclear plant’” Ngau, Ex. 20 at 118 (quoting *PG&E*, 461 U.S. at 205). Vermont could not plausibly have interpreted ENVY and ENOI as waiving the right to assert federal preemption of state efforts that go to the very core of the NRC’s exclusive authority over radiological safety.

See, e.g., Olympic Pipe Line Co. v. City of Seattle, 437 F.3d 872, 883-84 (9th Cir. 2006) (citation

¹² *See also* Ngau, Ex. 19 at 21 n.24 (“To the extent that the Board is preempted from modifying the Rule 4.100 contracts, the Board is preempted from modifying the contracts on any state-law basis, including principles of estoppel.”); *id.* at 28 (“If the Board is preempted by federal law from granting the relief that the Utilities have requested, the Utilities have not explained how—nor even asserted that—the doctrine of estoppel can reestablish jurisdiction that has been federally preempted.”).

¹³ As a matter of law, waivers are construed strictly. *Cf. Inv. Props., Inc. v. Lyttle*, 739 A.2d 1222, 1229 (Vt. 1999) (“The language of a release ... should be narrowly interpreted, and if the parties did not include certain terms this should be interpreted as intentional exclusion of those terms.”); *N.Y. State Energy Research & Dev. Auth. v. Nuclear Fuel Servs., Inc.*, 561 F. Supp. 954, 966 (W.D.N.Y. 1983) (“A contract not to sue is disfavored by the law and will be strictly construed against the party asserting it as a bar, requiring clear and explicit language showing an intention to forebear from suit.”).

omitted) (rejecting an argument that a party had waived its right to assert preemption under the Pipeline Safety & Improvement Act, 49 U.S.C. § 60101 *et seq.*, reasoning that “[f]ederal preemption is the allocation of power and decision-making authority between the federal government and the state and local governments, based on the Supremacy Clause of the Constitution,” and “not an individual right of a third party”); *Me. Yankee Atomic Power Co. v. Bonsey*, 107 F. Supp. 2d 47, 50 (D. Me. 2000) (holding in the context of the AEA and NWPA that, “even if [Maine Yankee] purported to ‘waive’ federal authority [over SNF storage], the state would not thereby obtain any ability to regulate in those areas since Congress has reserved that power to itself”).

B. Plaintiffs Are Likely To Succeed On Their Federal Power Act Preemption Claim.

Plaintiffs are also likely to succeed on the merits of their Federal Power Act (“FPA”) preemption claim because Vermont’s scheme to extract below-market rates from ENVY for Vermont retail electric utilities conflicts with FERC’s exclusive authority to regulate the sale of electricity at wholesale.

The FPA requires that all wholesale electricity rates be “just and reasonable,” 16 U.S.C. § 824d(a), and grants FERC “*exclusive* authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce.” *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982) (emphasis added); *see also* 16 U.S.C. § 824(b)(1) (providing federal jurisdiction over “the transmission of electric energy in interstate commerce and ... the sale of electric energy at wholesale in interstate commerce”). Through the FPA, “Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. *States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates* or to insure that agreements affecting wholesale rates are reasonable.” *Miss.*

Power & Light Co. v. Miss. ex rel. Moore, 487 U.S. 354, 374 (1988) (emphasis added); *see also* *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964) (similar). A state, moreover, “must ... give effect to Congress’ desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.” *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986). Thus, under the “filed rate doctrine,” state courts and regulatory agencies are preempted by federal law from requiring the payment of rates other than the federal filed rate. *See, e.g., Entergy La., Inc. v. La. Pub. Serv. Comm’n*, 539 U.S. 39, 47 (2003) (“The filed rate doctrine requires ‘that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates.’ When the filed-rate doctrine applies to state regulators, it does so as a matter of federal pre-emption through the Supremacy Clause.”) (quoting *Nantahala*, 476 U.S. at 962); *Miss. Power*, 487 U.S. at 373 (same).

Over the past two decades, FERC has permitted sellers of wholesale electricity to file “market-based” tariffs. “These tariffs, instead of setting forth rate schedules or rate-fixing contracts, simply state that the seller will enter into freely negotiated contracts with purchasers.” *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 537 (2008); *see also* *Pub. Util. Dist. No. 1 of Snohomish Cnty. v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 760 (9th Cir. 2004) (“[A] market-based umbrella tariff ... preauthorizes the seller to engage in market-based sales and puts the public on notice that the seller may do so.”) (quotation omitted).¹⁴ After authorizing a utility to charge market-based rates, FERC imposes ongoing

¹⁴ “The theory is that a seller cannot raise its price above the competitive level without losing substantial business to rival sellers unless the seller has market power, and therefore that FERC’s determination that a seller lacks market power provides a ‘strong reason to believe’ that sellers will be able to charge only just and reasonable rates.” *Dynegy Power Mktg., Inc.*, 384 F.3d at 760 (quoting *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 871 (D.C. Cir. 1993)).

reporting requirements, and “it may revoke the authority prospectively” if it “determines from these filings that a seller has reattained market power.” *Morgan Stanley Capital Grp. Inc.*, 554 U.S. at 538. A market-based tariff, like other tariffs filed with FERC, is subject to the filed rate doctrine. *See, e.g., Tex. Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503, 510 (5th Cir. 2005) (holding that market-based rates are “‘filed’ within the meaning of the filed rate doctrine” given regulators’ “oversight over the market”).

Here, ENVY applied for and received authorization from FERC to sell, at wholesale, its power into the ISO-NE interstate market at market-based rates. Compl. ¶ 42; Ngau, Ex. 21 (*Entergy Nuclear Vermont Yankee LLC*, Dkt. No. ER02-564-006 (Jan. 7, 2009)); Ngau, Ex. 22 (*Entergy Nuclear Generation Co.*, Dkt. No. ER99-1004-007 (Oct. 11, 2006)); *Entergy Nuclear Generation Co.*, 116 FERC P 61101, 2006 WL 2126693 (2006); Ngau, Ex. 23 (*Entergy Nuclear Vermont Yankee, LLC*, Dkt. No. ER02-564-000 (Feb. 5, 2002)). Vermont officials, however, have conditioned approval of Vermont Yankee’s CPG upon ENVY selling power at below-market rates to in-state retail electric utilities. *See supra*, at 11-12 & n.3; Compl. ¶¶ 82-85. Such lower rates would necessarily be different from—and thus conflict with—the existing market-based rates that Entergy has negotiated without interference from the State pursuant to the market-based tariff filed with FERC. Vermont’s attempt to extract these below-market rates as a condition of the issuance of a State CPG thus intrudes upon FERC’s exclusive authority to establish wholesale electricity rates and is plainly preempted by the FPA. *See, e.g., Entergy La., Inc.*, 539 U.S. at 47, 49-50; *Nantahala Power & Light Co.*, 476 U.S. at 966; *cf. Miss. Power & Light Co.*, 487 U.S. at 371 (“States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair.”).

C. Plaintiffs Are Likely To Succeed On Their Claim That The Vermont Laws Violate The Commerce Clause.

Plaintiffs are also likely to succeed on the merits of their claim that Vermont's decision to condition approval of a new CPG for Vermont Yankee on ENVY providing favorable rates for *Vermont* retail electric utilities violates the Commerce Clause. This naked preference for in-state utilities has no legitimate local purpose, but rather is designed to benefit Vermonters at the expense of utilities and consumers in neighboring States. Vermont may not, consistent with the Commerce Clause, compel ENVY to discriminate among utilities in this manner.

The Supreme Court has interpreted the Commerce Clause "as a restriction on permissible state regulation" that applies "even in the absence of a conflicting federal statute." *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979). Based on this so-called "dormant" or "negative" aspect of the Commerce Clause, "[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," the Supreme Court has "generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *see also Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) ("[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected."). A state statute impermissibly discriminates against interstate commerce where it accords "differential treatment [to] in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994).

Here, Vermont's scheme facially discriminates against interstate commerce because it requires ENVY to provide to retail electric utilities operating in the State (and thus serving Vermont residents) rates more favorable than those provided to retail electric utilities operating outside of Vermont (and thus serving residents of other States). This mandated preferential

treatment to in-state utilities contravenes *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), which held that a New Hampshire statute requiring a hydroelectric generating company “at special rates adjusted to reflect the entire savings” attributable to its low costs violated the Commerce Clause because it was “designed to gain an economic advantage for New Hampshire citizens at the expense of New England Power’s customers in neighboring states.” *Id.* at 336, 339. The Court stated that New Hampshire’s requirement “that its residents be given a preferred right of access, over out-of-state consumers ... is precisely the sort of protectionist regulation that the Commerce Clause declares off limits to the states.” *Id.* at 338-39; *see also Brown-Forman Distillers Corp.*, 476 U.S. at 580 (“Economic protectionism is not limited to attempts to convey advantages on local merchants; *it may include attempts to give local consumers an advantage over consumers in other States.*”) (emphasis added). Vermont’s scheme discriminates against interstate commerce and out-of-state utilities and thus is equally unconstitutional.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION.

Plaintiffs will manifestly suffer irreparable harm in the absence of preliminary relief because Vermont’s statutory scheme threatens to shut down the Vermont Yankee Station. While ultimately the harm will be suffered by all Vermonters, Plaintiffs are suffering immediate and direct harm from Vermont’s actions, harm for which no monetary award would be adequate compensation.

A preliminary injunction should be granted where a party will suffer damages for which there is no adequate remedy at law. *St. Albans Coop. Creamery, Inc. v. Glickman*, 68 F. Supp. 2d 380, 385 (D. Vt. 1999). In *St. Albans Cooperative Creamery*, dairy producers in the Northeast were granted a preliminary injunction against the Secretary of Agriculture to enjoin

him from enforcing a final rule amending federal milk market orders. The dairy producers alleged that they would lose substantial amounts of income in the immediate future and suffer irreparable harm in the absence of a temporary restraining order. *Id.* at 385-86. The economic losses alleged by the dairy producers were irreparable because, once the new milk pricing system was implemented, the dairy producers would be unable to recover the lost revenue and there was no alternative remedy at law for the losses that would occur. *Id.* at 386.

Second Circuit law is also clear that an act threatening the destruction of an ongoing business concern constitutes irreparable harm. *See John B. Hull, Inc. v. Waterbury Petroleum Prods.*, 588 F.2d 24, 28-29 (2d Cir. 1978). In numerous respects, the risk of the Vermont Yankee Station being shut down not only threatens the destruction of ENVY as an ongoing business concern in the long term, but also poses a major disruption of ENVY's business in the short term, which itself is sufficient irreparable harm to warrant a preliminary injunction. *See, e.g., Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 435 (2d Cir. 1993) ("Major disruption of a business can be as harmful as termination.").

A. Irreparable Harm From Loss Of The Vermont Yankee Station's Skilled Workforce.

Defendants' threat to shut down the Vermont Yankee Station in March 2012 is already causing harm to Plaintiffs because numerous skilled employees, who are extremely difficult and costly to replace, have recently left their jobs based on their concern that the Vermont Yankee Station may be shut down as of March 21, 2012. More are likely to do so as that date approaches to the point that the loss of employees alone constitutes irreparable harm because it threatens the ability of the Vermont Yankee Station to operate.

Given the Vermont Yankee Station's highly demanding operational requirements, it must have a highly skilled, well-trained and dedicated workforce. The Vermont Yankee Station's

operators must have either an Operator License or a Senior Operator License issued by the NRC. Herron ¶ 19. Because there are significant differences among nuclear facilities, these licenses are Vermont Yankee Station-specific. *Id.* In other words, the Operator License for another nuclear generating facility does not qualify the license holder to operate Vermont Yankee Station. Even if a skilled operator from another plant wished to relocate to the Vermont Yankee Station, that operator would first need to complete the specific requirements to obtain an Operator License or Senior Operating License for the Vermont Yankee Station before he or she could be an operator there. *Id.*

The Operator-License training and application process is lengthy. A Vermont Yankee Station Operator License or Senior Operator License requires the successful completion of a 24-month training program with written examinations and field demonstration examinations that are administered by the NRC. *Id.* ¶ 20. Even after such licenses are obtained, operating crews return to the plant simulator and training facility every six weeks for one week of further training and requalification. *Id.* Training for Vermont Yankee Station technicians is also specific to the particular position and typically requires up to 12 months of initial training with annual retraining and requalification. *Id.*¹⁵ Moreover, because the commercial nuclear power industry has not been a growth industry for many decades, the number of people who have chosen to enter the industry has been limited. *Id.* ¶ 21. There are 104 operating nuclear facilities in the United States, and the competition to hire the best workers is intense. It is not uncommon for nuclear plant operators to offer both financial and non-financial incentives to entice workers to move. *Id.*

¹⁵ Vermont Yankee Station's training programs are accredited by the Institute for Nuclear Power Operations ("INPO"), a nuclear industry association that was formed to promote the highest levels of excellence in safety in the operation of commercial nuclear facilities and imposes standards higher than those imposed by the NRC. Herron ¶ 17.

In this environment, the current uncertainty as to whether the Vermont Yankee Station will be allowed to continue operating after March 2012 is making it difficult for the Vermont Yankee Station to retain the highly specialized and skilled personnel needed to operate the plant. In the past few years, the number of employees who have chosen to leave Vermont Yankee Station and seek employment elsewhere has increased significantly. In 2010, the attrition rate—the percentage of employees who left the Vermont Yankee Station to work elsewhere—rose to over 8 percent, an increase over prior years. *Id.* ¶¶ 24-25. In 2011, the attrition rate is on track to meet or exceed the 2010 rate. *Id.* ¶ 25. Exit interviews conducted with departing Vermont Yankee Station employees reveal that the concern over the plant’s future beyond March 2012 is a recurring reason for the departures; for example, in just the first three months of 2011, 8 of 13 departing employees cited “relicensing” as either the primary or secondary reason for their decision to leave. *Id.* ¶ 27.

This same uncertainty is making it difficult, if not impossible, for Plaintiffs to find replacement workers of the highest quality for these positions. While Vermont Yankee Station operators may well be willing to make the training commitment required to become licensed to operate other facilities in the expectation of longer-term job security, operators at other facilities are very unlikely to make the training commitment required to become licensed to operate Vermont Yankee Station given the present uncertainty. *Id.* ¶ 22; *see also* Kee ¶ 14. Indeed, on March 17, 2009, the Public Oversight Panel of the General Assembly issued its Report for the Vermont Yankee Reliability Assessment and found that the “contentious discourse” occurring within the Vermont government regarding the future of the Vermont Yankee Station was itself harming ENVY’s ability to attract and keep skilled workers:

It is not our intention to take sides in this discourse. Our point is that the nature of the current discourse has the potential to impede

reliability, particularly because *it raises barriers to Vermont Yankee's ability to attract the needed skilled workers in a highly competitive nuclear job market.*

Ngau, Ex. 24 (Public Oversight Panel, *Comprehensive Reliability Assessment of the Vermont Yankee Nuclear Power Plant*, Mar. 17, 2009), at 38 (emphasis added).

Accordingly, absent a preliminary injunction that would allay workers' concerns about an imminent shutdown in less than a year, Plaintiffs may prevail in this litigation only to find that the skilled workers needed to continue operating the plant have left. *See Herron* ¶ 28. These problems will only be magnified if the Vermont Yankee Station is actually shut down while this case is pending.

B. Irreparable Harm From Preparation For The Fall 2011 Refueling Outage.

Plaintiffs will soon suffer a second type of irreparable harm from the threat of a March 21, 2012 shutdown, again even before the shutdown actually occurs. Specifically, Plaintiffs must decide by July 7, 2011, whether to make substantial investments necessary to continue operation of the plant past March 21, 2012. If Plaintiffs make those investments but the Vermont Yankee Station is shut down before the trial on the merits of this action, then the investments will be impaired and possibly lost entirely—even if Plaintiffs ultimately prevail at the trial on the merits.

Specifically, the Vermont Yankee Station has mandatory refueling outages scheduled approximately every 18 months. These outages are necessary because, over time, the nuclear fuel in the reactor core produces less and less heat and consequently less and less electricity.¹⁶ There are 368 fuel assemblies in the reactor core of Vermont Yankee Station. During each refueling outage, one-third of the reactor core—approximately 120 fuel assemblies—is replaced

¹⁶ The heat generated by the nuclear reaction converts water to steam, and the pressure from that steam is processed into a turbine generator that produces electricity. *Herron* ¶ 11.

with new fuel assemblies. Herron ¶ 29. Additionally, during the refueling process, workers perform NRC-required inspections, testing, and other work that cannot safely be performed while the reactor is operating. *Id.* ¶ 30. During a typical Vermont Yankee Station outage, there are approximately 5,000 tasks to be performed during an approximately 25 day period. *Id.* ¶ 31. To perform these tasks, approximately 800 to 1,000 supplemental skilled worker are brought in from other Entergy nuclear facilities, craft labor unions and outside contractors. *Id.* These supplemental workers and Vermont Yankee Station's regular employees work on an around-the-clock basis, seven days a week during the refueling outage. *Id.* ¶ 31.

The Vermont Yankee Station's next outage is scheduled for October 2011, and for several reasons, it cannot be postponed. *First*, to avoid potential disruptions to reliability of service from the lack of sufficient electric generating capacity, outages of large generating facilities like the Vermont Yankee Station need to be scheduled during the fall and spring seasons when temperatures are relatively mild and electricity demand is below the peak levels experienced during the summer and winter seasons. *Id.* ¶ 34. *Second*, any delay in the outage exceeding 30 days will require a re-analysis of the nuclear core and, if the delay significantly exceeds 30 days, re-design and re-fabrication of the new fuel assemblies to be installed, which would extend the outage by several weeks during which ENVY would lose millions of dollars in revenues. *Id.* ¶ 35. *Third*, Vermont's winter weather presents major risks and complications if the October 2011 outage were postponed to any significant extent: the skilled temporary workers needed to perform the thousands of tasks during the outage may be unwilling to work in Vermont during the winter and winter weather can disrupt the precise time tables required for these tasks, including disrupting the movement of large trucks and other pieces of heavy equipment. *Id.* ¶ 36. *Fourth*, the Vermont Yankee Station's NRC license requires certain

mandatory inspections that can only be safely and efficiently performed during an outage. The mandatory NRC inspections and testing now scheduled to be done during the October 2011 refueling outage cannot be delayed beyond mid-February 2012 or after the winter weather period has passed. *Id.* ¶ 37.

Certain decisions with major financial consequences must be made well in advance of the October 2011 outage. As an initial matter, ENVY has a contractual deadline of July 7, 2011 to place its order to fabricate the nuclear fuel assemblies that will be installed during the outage. *Id.* ¶ 39. The July 7 deadline is necessary to provide the fabricator sufficient time to fabricate the fuel assemblies and ship them to Vermont Yankee Station in time for the October 2011 outage. *Id.* Once ENVY issues the fabrication order, ENVY becomes irrevocably committed contractually to pay for the fabrication services, the total cost of which falls in the range of \$5-10 million. *Id.* (The entire value of the fuel assemblies exceeds \$60 million. *Id.* ¶ 42.)¹⁷ Because fuel assemblies that are fabricated for Vermont Yankee Station are tailored to the particular technical specifications of that facility, they cannot then be used in another nuclear facility, at least not without incurring tens of millions of dollars of additional costs to re-fabricate the assemblies for use at another facility run by an Entergy corporate affiliate or for sale to another nuclear power plant. *Id.* ¶¶ 39, 41. Once the new fuel assemblies are placed into the refueling pool (which typically occurs one month before the start of the refueling outage), they become mildly contaminated with radioactive compounds that are in the refueling pool water, making it even costlier to re-purpose them for use elsewhere. *Id.* ¶ 41. And once the new fuel assemblies are loaded into the core, they become highly radioactive and impossible to use in any other nuclear power plant, such that their only valuable use would be as fuel for the Vermont Yankee

¹⁷ Similarly, as discussed above, the fuel outage requires Plaintiffs to incur the substantial costs of hiring the supplemental skilled workers.

Station. *Id.* ¶ 42. ENVY therefore needs to make increasingly costly commitments to prepare for refueling the Vermont Yankee Station, beginning as early as July 7, 2011, if the plant is to continue to operate beyond March 21, 2012. *Id.* If, on the other hand, Plaintiffs choose not to refuel the Vermont Yankee Station, the plant will become uneconomic to operate because the reactor core will become depleted and the plant will continually decrease while operating costs remain largely constant. *Id.* ¶¶ 44-46.¹⁸ The only way to avoid these substantial operating costs will be to permanently shut down the plant. *Id.* ¶ 47.

Whether Plaintiffs could recover any of these lost expenses and revenues from the State of Vermont through a state-court suit (or, thereafter, a federal regulatory takings claim) is highly uncertain. *See Alger v. Dep't of Labor and Indus.*, 917 A.2d 508, 520 (Vt. 2007) (explaining that instances in which the state eradicates a public nuisance do not qualify as a compensable takings); *Chioffi v. City of Winooski*, 676 A.2d 786, 788 (Vt. 1996) (explaining that “regulatory delay cannot normally give rise to a temporary takings claim”); *Donohue v. Paterson*, 715 F. Supp. 2d 306, 316 (N.D.N.Y. 2010) (“The Second Circuit has stated that where a federal remedy to recover pecuniary losses is barred under the Eleventh Amendment, irreparable harm is present.”) (citing *United States v. State of New York*, 708 F.2d 92, 93 (2d Cir. 1983)). In such circumstances of quantifiable but potentially unrecoverable money damages, irreparable harm is established. *See, e.g., Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 72 F. Supp. 2d 449, 454 (D. Vt. 1999)

¹⁸ Specifically, beginning around mid-September 2011, the Vermont Yankee Station’s power output will drop below the plant’s full capacity—which is another reason the refueling outage cannot be delayed much past October—and will continue to drop by approximately 1.5 percent per week. Despite that continuing drop in power output, operating costs will remain essentially constant—more than \$6 million per month—as long as the plant remains operating, because the NRC’s regulations, and ENOI’s own rules, do not permit any reductions in the plant’s workforce or any cutbacks in operational, safety, or security requirements while the plant is in operational mode. With shrinking revenues and essentially constant costs, it will become impossible for the plant to operate economically if new fuel assemblies are not loaded into the Vermont Yankee Station’s reactor core in October. Herron ¶¶ 44-46.

(“Even should the plaintiff ultimately prevail here, it could not recover any funds expended in complying with Vermont’s ... law because the state defendants are protected by the Eleventh Amendment.”), *vacated on other grounds*, 272 F.3d 104 (2d Cir. 2001); *Entergy Ark., Inc., v. Nebraska*, 210 F.3d 887, 899 (8th Cir. 2000) (“The importance of preliminary injunctive relief is heightened in this case by the likely unavailability of money damages should the Commission prevail on the merits of its claims. Relief in the form of money damages could well be barred by Nebraska’s sovereign immunity.”).

C. Irreparable Monetary Losses From A “Temporary” Shutdown That May Be Irreversible.

If, absent a preliminary injunction, Vermont is permitted to shut down the Vermont Yankee Station on March 21, 2012 federal regulations may prevent the Vermont Yankee Station from re-starting should Plaintiffs subsequently prevail at the trial on the merits, thus making the “temporary” shutdown permanent and causing Plaintiffs loss of revenues not only during the pendency of the litigation, but for the twenty years remaining under the recently issued federal NRC renewal license for the Vermont Yankee Station. Specifically, a nuclear power plant must submit a written certification to the NRC within thirty days of the decision permanently to cease operations.¹⁹ Kee ¶ 24; Kee, Ex. 4; Kee, Ex. 5 (10 C.F.R. § 50.82(a)(1)(i)). Although the NRC Regulatory Guide discusses the evaluation of a possible withdrawal of the certification “on a case-by-case basis,” Kee, Ex. 4 at 1.184-8, the likelihood that such a withdrawal would succeed is difficult to predict as it has never been attempted. Kee ¶¶ 24-25. Similarly, Vermont might

¹⁹ Although the regulations speak in terms of “permanent” cessation, Kee, Ex. 4 (NRC Office of Nuclear Research, *Regulatory Guide 1.184, Decommissioning of Nuclear Power Reactors*, at 1.184-7 (July 2000)), the requirement to file a certificate appears to apply because the regulations do not contemplate temporary cessation. Moreover, absent a preliminary injunction and prior to the trial on the merits, ENVY and ENOI would not know how long a temporary cessation would last or whether ENVY and ENOI would ultimately prevail at the trial on the merits (in the event they lost, and then lost on appeal, any cessation would be permanent).

assert that, as a matter of Vermont law, the Vermont Yankee Station must be decommissioned rather than kept in a state of readiness for possible restart. *Id.* ¶ 27. If the Vermont Yankee Station is permanently shut down on March 21, 2011, it would lose profits from operation during the 20-year NRC license renewal period and it would incur substantially higher decommissioning costs than if it continued to operate until 2032. *Id.* ¶¶ 30-35. According to the GDS Study, decommissioning the Vermont Yankee Station in 2012 rather than 2032 using the SAFSTOR method will cause an increase in the decommissioning cost from \$58.7 million to \$86.4 million (in 2006 dollars). *Kee* ¶ 31 & Ex. 7 at 6-6.

Moreover, the State of Vermont is reneging on a prior agreement regarding the manner in which Vermont Yankee may be decommissioned. Instead of the SAFSTOR method, which is specifically provided for in the MOU, and which, while still expensive, would permit ENVY to gradually decommission Vermont Yankee over 60 years, the State of Vermont is now insisting on the DECON method. *Ngau*, Ex. 10.²⁰ Under the DECON method, the equipment, structures, and portions of a facility and site containing radioactive contaminants are removed or decontaminated to a level that permits the property to be released for unrestricted use shortly after cessation of operations. *See Kee*, Ex. 7 at 6-1. If the Vermont Yankee Station is forced to use the DECON method, the excess cost will constitute further irreparable harm.

These costs are irreparable because the prospect of their recovery from the State of Vermont is uncertain, *see supra*, at 40-41, especially because they could amount to hundreds of millions of dollars, *see Long Island Lighting Co.*, 628 F. Supp. at 661 (“While the harm posed by LILCO’s inability to test its [emergency plan, necessary to begin operations] is largely economic, it is of such huge proportions as to threaten harm that cannot be adequately

²⁰ The Vermont General Assembly has attempted to renege on this agreement before, but the legislation in question was vetoed by then-Governor Douglas. *See Ngau*, Ex. 18 at 4-5.

compensated after the fact by money damages.”). They are also irreparable because they involve destroying a business, a harm that goes beyond mere financial loss. *See, e.g., Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970) (affirming the grant of a preliminary injunction because the right to continue a business is not measurable in monetary terms); *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124, 125-26 (2d Cir. 1984) (*per curiam*) (“The loss of Roso-Lino’s distributorship, an ongoing business representing many years of effort and the livelihood of its husband and wife owners, constitutes irreparable harm.”).

But even if it were possible as a matter of federal and state regulation temporarily to shut down the Vermont Yankee Station and keep it in a state of readiness for restart, Plaintiffs would incur substantial costs during that period of time (including maintaining the plant and complying with any NRC or Vermont requirements for possible approval of restart), with no revenues. These costs (and hence losses) would be millions of dollars per month. *Kee* ¶ 28.

D. Irreparable Harm From Loss Of Long-Term Power Contracts.

Contracts between energy retailers and energy wholesalers are typically made one year or more in advance. *Kee* ¶ 16. Because the entire purpose of long-term contracts is to have an economically predictable source of supply, the uncertainty created by Vermont’s plan to shut down the Vermont Yankee Station on March 21, 2012 has made it difficult for ENVY to enter into such contracts. *Id.* ¶ 19. Those contracts that ENVY has been able to enter for post-March 21, 2012 supply have had to include a contingency provision excusing ENVY from performance in the event that the Vermont Yankee Station does not generate power, and this contingency provision (because it increases uncertainty to the retailer) necessarily results in the contract being less valuable to the retail utility, which correspondingly will pay a lower price to ENVY. *Id.*

¶¶ 19-20.²¹ Other retail utilities, including those that have contracted with ENVY in the past, are likely to be unwilling to enter into long term contracts with ENVY that contain this contingency provision, and instead turn to other wholesale suppliers. *Id.* ¶ 21.

These losses are difficult to quantify and are therefore irreparable. For example, in *Reuters Ltd. v. United Press International, Inc.*, 903 F.2d 904 (2d Cir. 1990), the Second Circuit reversed the district court's denial of a preliminary injunction, finding that the failure to preserve the status quo would cause irreparable harm to UPI. *Id.* at 908-09. UPI and Reuters had an agreement to exchange photos, with UPI supplying Reuters with photos from the U.S. and Reuters supplying foreign photos. *Id.* at 905. Reuters tried to get out of the agreement. *Id.* at 906. The Second Circuit held that UPI had shown irreparable harm because some customers would cease dealing with it for news from any source if it were unable to continue supplying those particular foreign news pictures: "[I]n cases where a preliminary injunction has issued to prevent a product source from suspending delivery to a distributor, the irreparable harm has often consisted of the loss of customers and the competitive disadvantage that resulted from a distributor's inability to supply its customers with the terminated product." *Id.* at 909; *see also*, e.g., *Rex Med. L.P. v. Angiotech Pharm., Inc.*, No. 10 Civ. 8746, 2010 WL 4977775, at *5-6 (S.D.N.Y. Dec. 1, 2010). But even if the losses could be quantified, ENVY's ability to recover them from Vermont is highly uncertain and thus irreparable for that reason.

²¹ This is confirmed by the proposed electricity sale agreements between ENVY and the Vermont Electric Cooperative that were reported to include prices at "4.9 cents per kilowatt hour for the first year of a 20-year contract and then for prices tied to market price thereafter." Kee ¶ 20 & Ex. 3 (Terri Hallenbeck, *Entergy: No sale of Vermont Yankee*, BURLINGTON FREE PRESS, Mar. 30, 2011). The news report notes that these prices are "below the current market price and below the 6-cent starting price utilities recently agreed to pay for Hydro-Quebec power." Kee, Ex. 3 at 2.

III. THE BALANCE OF THE HARDSHIPS WEIGHS HEAVILY IN FAVOR OF A PRELIMINARY INJUNCTION.

It is difficult to overstate the disparity between the hardships at issue in this case. As discussed above, absent a preliminary injunction, Vermont's planned shutdown of the Vermont Yankee Station will cause substantial irreparable harm and indeed is already causing such harm from the loss of skilled employees and long-term contracts. By contrast, granting a preliminary injunction will do nothing more than preserve the status quo, under which Vermont citizens, and those in the surrounding States serviced by ISO-NE, enjoy low-cost, reliable, safe, clean-emissions power from the Vermont Yankee plant, with no incremental burden imposed on Vermont governmental resources. *Kee* ¶ 43 n.26. The Vermont Yankee Station can always be decommissioned at a later time if, at the end of the day, the Court decides that, despite authorization from the NRC, Vermont has the power to forbid the plant from operating.

Where, as here, the harm to Defendants from a preliminary injunction preserving the status quo is dwarfed by the harm that Plaintiffs will suffer in its absence, a preliminary injunction is clearly warranted. *See, e.g., Nemer Jeep-Eagle, Inc.*, 992 F.2d at 436 (“[T]he balance of the equities in this case tips decidedly in favor of appellant being granted specific performance of its contract because neither Eagle Sales nor the four new dealers will suffer harm proportionate to appellant's loss of business as a result of a *status quo* injunction.”).

IV. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST.

Unlike the traditional commercial dispute, this case involves serious federal preemption questions and also implicates the interests of private citizens throughout Vermont and the rest of New England. Thus, the public interest, a customary factor in preliminary injunction cases, *see, e.g., Beal v. Stern*, 184 F.3d 117, 123 n.2 (2d Cir. 1999), is especially important here. Granting a

preliminary injunction that prohibits Vermont officials from shutting down the Vermont Yankee Station during the pendency of this action best serves the public interest.

A. Loss Of Jobs.

The loss of the Vermont Yankee Station will have a quantifiably negative impact on Vermont's economy. The Vermont Yankee Station currently employs over 600 people from the surrounding area, most of whom will lose their jobs if the plant is forced to shut down and begin decommissioning under the SAFSTOR method, and even more of whom will lose their jobs if Vermont successfully forces the Vermont Yankee Station to be decommissioned using the DECON method.

1. Consensus Study.

In March 2010, a group of energy and economic experts, including energy consultants hired by the General Assembly's Joint Fiscal Committee, consulting economists hired by Vermont's two largest utilities, power planners from the Vermont Department of Public Service, and power planning experts from the State's two largest utilities, developed a set of consensus energy and economic impact analyses associated with the continued operation or closure of the Vermont Yankee Station after 2012. Kee, Ex. 9 at 1. This "Consensus Study" found that a shutdown of the Vermont Yankee Station in 2012, rather than 2032, means approximately 1,060 fewer jobs for Vermont for the period from 2013 through 2031, though that number is slightly lower if the Vermont Yankee Station is implementing SAFSTOR decommissioning during the same period. *Id.* at 8-9; Kee ¶¶ 40-41. The Consensus Study also found that secondary indirect and induced economic impacts would be higher if the effect on New Hampshire and Massachusetts were taken into account, as 60 percent of Vermont Yankee Station employees reside (and spend most of their personal income) in those states. Kee, Ex. 9 at 8-9.

When taking into account higher retail energy prices that would be caused by a shutdown of the Vermont Yankee Station, and the impact of losing the Revenue Sharing Agreements (under which ENVY shares Vermont Yankee Station revenues with Vermont utilities), the Consensus Study found that shutting down the Vermont Yankee Station in 2012 would “result in about 1,100 fewer jobs per year and real disposable personal income levels more than \$60 million per year (in 2012 dollars) below” the level they would be with the Vermont Yankee Station in operation through 2032. *Id.* at 9.

2. IBEW Study.

A 2010 report by the International Brotherhood of Electricity Workers (“IBEW”) Local 300 (Kee, Ex. 6 (Richard W. Heaps, Northern Economic Consulting, Inc., *The Economic Impact of the VY Station*, Jan. 31, 2010)) (the “IBEW Study”), a union to which approximately 160 Vermont Yankee Station employees belong, found that the Vermont Yankee Station had 642 employees and that the plant employed between 25 and 30 non-employee contractors for food services and non-nuclear construction. *Id.* at 3. These jobs would be lost if the Vermont Yankee Station is shut down, although a smaller number of jobs may remain (*e.g.*, jobs related to security of the SNF storage casks and the closed nuclear plant and, eventually, jobs related to decommissioning). *Id.* The IBEW Study notes that these jobs result in a larger economic impact and are linked to a total of 1,288 jobs in Vermont with \$93.3 million in wages (in 2009). *Id.* at 4; Kee ¶ 39.

3. Effects On Other Employers.

A shutdown will have a negative impact on Vermont’s economy not only due to the loss of the Vermont Yankee Station itself, but also due to the potential loss of other area businesses that may leave the state or be forced to conduct layoffs if power costs rise in the absence of the Vermont Yankee Station. The resulting increase in costs for local businesses would be

significant. IBM, the largest employer in Vermont, estimated that its electricity costs would rise by 25 percent if Vermont Yankee Station were shut down, prompting a discussion of whether the cost of doing business in Vermont would become too high for the company. Kee, Ex. 17 (Melinda Davenport, *IBM Warns Lawmakers About the Loss of Vt. Yankee*, WCAX, Jan. 26, 2011); Kee ¶ 51. Noting the impact of a shutdown of the Vermont Yankee Station on electricity rates, a CEO of another company, Fab-Tech, Inc., that employs nearly 150 people in Colchester, Vermont recently stated that “[t]he increased cost of electricity if Yankee is not relicensed could have a direct effect on employment at our Vermont facility.” Ngau, Ex. 25 (Press Release, *Business and Labor Leaders: Vermont Yankee Closure will Jeopardize Jobs and State’s Economic Recovery* (Feb. 10, 2011)).

B. Lower Tax Revenue.

Early closure of the Vermont Yankee Station will result in lower tax revenues for the state of Vermont, both directly and indirectly. In addition to the loss of income tax revenue from lost jobs described above, Vermont will lose the substantial taxes paid by the Vermont Yankee Station itself.

A report issued in February 2011 by the Vermont Legislative Joint Fiscal Office estimated that the tax revenue from Vermont Yankee Station was \$6.71 million in 2010 and estimated at \$6.74 million in 2011. Kee, Ex. 13 at Table 2. This amount includes the Electrical Energy Tax (General Fund) and the Electric Generating Plant Education Property Tax, neither of which would accrue if no electricity is generated. Kee ¶ 46. Over and above tax revenues are the lost revenues from the ripple effect on the local economy of losing the Vermont Yankee Station and its workers. For example, the Consensus Study concludes that the total negative fiscal impact of a Vermont Yankee Station shutdown is as high as \$6 million per year with a 20-year cumulative total of about \$109 million by 2032. *Id.* ¶ 44. The IBEW Study estimated that

the jobs linked to the Vermont Yankee Station resulted in \$4.87 million in income tax, retail sales and use tax, and other tax revenues for Vermont. Kee ¶ 45 & Ex. 6 at 16.

The GDS Study (Kee, Ex. 7), prepared under contract with the Vermont Department of Public Service pursuant to Act 160, was provided to the PSB and to Vermont's Legislative Committees on Natural Resources and Energy, the House Committee on Commerce, and the Senate Committee on Finance for their consideration of ENVY and ENOI's petition for a CPG to operate the Vermont Yankee Station through 2032. The GDS Study analyzed the effects of the Vermont Yankee Station operating through 2032, including "a tax/revenue assessment of burdens placed on the government and taxes collected by the government due to operation of the facility; an economic impact analysis of the multiplicative effects on the economy through total value added and jobs supported by operations of Vermont Yankee; the value to ratepayers of a revenue sharing arrangement between ENVY and certain electric utilities in Vermont; and the possibility that ENVY might sell power out of Vermont Yankee to in-state utilities at some discount from market prices." Kee, Ex. 7 at 1-14.

The GDS Study noted that the Vermont Yankee Station provides four primary sources of revenue to Vermont: (1) taxes associated with increased economic activity, (2) state income taxes collected on salaries of full-time employees, (3) the Electrical Energy Tax, and (4) the Education Property Tax. The GDS Study concluded that "[c]ontinued operation of the Vermont Yankee nuclear facility represents a substantial economic value to the State of Vermont and its citizens." *Id.* Taking into account a variety of factors, the GDS Study found:

The cost/benefit analysis conducted in this study and detailed in Chapter 11 indicates that positive value is created for the local and state governments, the economy as a whole, and the electric ratepayers of the state if the station continues to operate an additional 20 years. The total 20-year value is estimated to range from an extreme low potential of \$1.5 billion to an extreme high of

\$5.1 billion, representing between 0.2% and 0.6% of estimated Gross State Product over the 20 years. The base case value is \$3.6 billion over 20 years. These results can be construed to represent the likely cost to the economy of shutting down Vermont Yankee in 2012 as opposed to extending its operating license.

Id. at 1-15. Put another way, the GDS Study found that the additional economic activity generated by the Vermont Yankee Station operating through 2032 would be “enough to support anywhere from 21,298 to 36,884 full time equivalent job-years over the twenty years of continued operations (one full-time job held for twenty years represents twenty job-years).” *Id.* Without the Vermont Yankee Station, that economic activity will not occur.

Moreover, because the Vermont Yankee Station is one of the top five employers in Windham County, the negative effects of a shutdown of the Vermont Yankee Station will be especially high there. The GDS Study finds that “the local real estate market would likely see a depression in home values with a relatively high number of homes entering the market in a short period of time. That, in turn, might be enough to suppress new home construction for some time, having adverse impacts on the construction sector as well.” *Id.* at 11-6. Although the GDS Study did not attempt to quantify the impact, it noted that a shutdown of the Vermont Yankee Station would cause the economy to lose the value of family members of VY employees who worked in local jobs, potentially increasing unemployment and consequent burdens on local government. *Id.*

C. Higher Power Prices.

“Vermont Yankee currently provides energy at a relatively low and stable cost when compared against its practicable alternatives.” Key, Ex. 7 at 12-4. There is no doubt that, if the Vermont Yankee Station is shut down in 2012, the cost of retail power will be higher for Vermont citizens. As the GDS Study found, if the Vermont Yankee Station is retired, energy

prices throughout the region will increase. *Id.* at 12-4 to 12-5. For example, the GDS Study states:

While Hydro Quebec (HQ) imports stand as one of the most accessible replacements for electricity currently being purchased from Vermont Yankee, such imports will likely be more expensive. Unlike Vermont Yankee, Vermont has limited negotiating leverage with HQ. Any additional power coming from HQ would be procured under a new contract, with terms negotiated by HQ and the Vermont utilities.

Id. at 12-10 to 12-11.

While Vermont utilities could try to build capacity to replace the Vermont Yankee Station, the GDS Study notes that “most alternatives will likely have higher production prices than imports from Quebec, with the exception of some larger coal plant options.” *Id.* at 12-11. In fact, Vermont’s utilities recently did renew their contracts with Hydro Quebec, but for only 225 MWH per year, for 26 years. Ngau, Ex. 26 (*Utilities Formally Sign Contract With Hydro-Quebec For Power*, VPR NEWS, Aug. 12, 2010). Thus, the State will be forced to look beyond Hydro Quebec to fill the gap left by the Vermont Yankee Station, meaning that it will almost certainly purchase higher-priced energy. Kee ¶ 57.

The Consensus Study similarly found that “the retail power bill is likely to be higher in the event of plant closure.” Kee, Ex. 9 at 9. While the Consensus Study did not quantify the increase in monetary terms, it found that these higher retail power prices will reduce employment in Vermont by approximately 120 jobs per year, and reduce economic output by more than \$15 million per year (in 2012 dollars). *Id.*

By contrast, continued operation of the Vermont Yankee Station will almost certainly result in below market power costs:

In the event that the Vermont Yankee facility’s license is renewed for continued operation post 2012, Entergy and the utilities will have 30 days to negotiate in good faith for new contracts. The

ultimate cost to Vermont for Vermont Yankee power post 2012 will obviously depend on results from these negotiations. However, a revenue sharing agreement with the Vermont Yankee Nuclear Power Company virtually ensures that, provided market prices remain above \$61.00/MWh, the net power costs from Vermont Yankee will be below market.

Kee, Ex. 7 at 12-11 to 12-12. In similar circumstances, courts have noted that the “specter of higher [power] costs and reduced services” warranted preliminary relief. *See Long Island Lighting Co.*, 628 F. Supp. at 661.

D. Lower Electrical System Reliability.

Through sales in the wholesale market and to Vermont’s retail utilities, the Vermont Yankee Station currently provides the equivalent of approximately one-third of the base-load power used by Vermont electricity consumers. Kee, Ex. 7 at 12-12. As recent reports have illustrated, Vermont’s long-term energy plan relies on the continued operation of the Vermont Yankee Station for the next 20 years and the state does not currently have a plan for how it will meet Vermont’s electricity needs if the plant is shut down. Ngau, Ex. 27 (*Shumlin Tackles New Energy Plan, Without Yankee in the Mix*, VPR NEWS, Jan. 27, 2011) (stating that Governor Shumlin was “very surprised to learn that the state’s long range energy plan counts on Vermont Yankee power for the next 20 years”).

The effects of a shutdown of the Vermont Yankee Station would extend beyond Vermont to the entire New England region. In its August 2010 Final Capacity Auction Results Filing (“FCA Results Filing”) to FERC, ISO-NE made clear that its planning through May 2014 includes having Vermont Yankee Station operating and supplying power to the New England region. ISO-NE noted that the loss of capacity from the Vermont Yankee Station would result “in overloads of transmission facilities in the Vermont, New Hampshire, and Western Massachusetts Load Zones,” and that “no other generation in New England would mitigate the

overloads.” Kee, Ex. 18 (ISO-NE, *Final Capacity Auction Results: Surplus Resources Available for 2013–2014*, Aug. 30, 2010), at 3; Kee ¶ 66. As a result, if ISO-NE cannot rely on power from the Vermont Yankee Station, it would need take dramatic and expensive steps to maintain the reliability of the New England electric system that would likely result in higher energy prices throughout the region. As ISO-NE put it:

If the Vermont Yankee license is not extended, the ISO will take whatever actions are necessary to maintain the reliability of the New England electric system. This could include, but may not be limited to: operating additional generation facilities the cost of which may be above market prices; planning for the accelerated construction of additional transmission facilities to deliver power to Vermont; or issuing so-called Gap RFPs, under which additional resources are procured in the area to reliably operate the power system.

Kee, Ex. 25(b) (Letter to Hon. Kimberly D. Bose, Secretary, FERC, from Raymond W. Hepper, ISO-NE (Aug. 30, 2010)), at 3. And just as with the Vermont Yankee Station’s own internal planning, these are expenses that ISO-NE would need to undertake merely because of the *possibility* that Vermont Yankee’s power may not be available in the future—expenses that likely could never be recovered even if Plaintiffs ultimately prevailed in this case.

More recently, ISO-NE conducted an assessment of the power transmission needs of Vermont and New Hampshire. That study, completed on February 17, 2011, found that, without the Vermont Yankee Station in operation, the risk that future disruptions in the energy grid will cause losses of electricity service (*i.e.*, blackouts) becomes more widespread and more severe:

[B]y the year 2020, the Vermont and New Hampshire transmission systems will need additional resources, transmission system upgrades, or a combination of both to reliably serve the forecasted demand for electricity. These additional resources could include generation, demand resources, or voltage support. Under a variety of scenarios and demand levels, potential thermal overloads and voltage violations were observed in almost every area of Vermont and New Hampshire, with potential overloads and voltage violations also seen in north central and western Massachusetts.

Many of these potential violations occur at current levels of demand. These issues exist with or without Vermont Yankee in service, but generally (but not always) tend to be more widespread and severe without Vermont Yankee. Under some circumstances, loss of load—that is, loss of electricity service—could occur in portions of Vermont and New Hampshire.

Kee, Ex. 23 at 2-3 (paragraph break omitted).

E. Increased Greenhouse Gas Emissions.

The Vermont Yankee Station is also a crucial part of Vermont’s commitment to minimizing its production of greenhouse gases. Having determined that global warming is a serious problem, and that global warming is caused by greenhouse gasses such as carbon dioxide, the State of Vermont has made it a priority to reduce greenhouse gas emissions and has taken affirmative steps to further this goal. *See* Ngau, Ex. 28 (Defs. and Def.-Intervenors’ Proposed Findings Of Fact, *Ass’n of Int’l Automobile Mfrs. v. Crombie*, No. 2:05-cv-00302, ECF No. 489 (D. Vt. June 15, 2007)), at ¶ 6 (litigation regarding Vermont’s 2005 adoption of California’s low-emissions vehicle standards); Kee ¶¶ 61-62 (describing Vermont’s participation in the Regional Greenhouse Gas Initiative). Indeed, in separate litigation before this Court, defending its own automobile emissions regulations, Vermont observed that

[t]here is a risk of abrupt climate change in the twenty-first century as a result of anthropogenic greenhouse gas emissions. While it is very difficult to predict when such a tipping point will occur, it is not difficult to predict that a tipping point will occur. A 2-3 degree Celsius global average temperature increase would cause an abrupt climate change and it could occur at any time.

Ngau, Ex. 28 at ¶ 97 (citations omitted). The State has also taken the position that “[a] relatively small reduction in carbon dioxide emissions is scientifically important because of the nonlinear nature of the climate system, including the nonlinear nature of phenomena such as ice sheet disintegration and species extinction.” *Id.* at ¶ 105.

The Vermont Yankee Station reduces Vermont's carbon footprint significantly. Without the Vermont Yankee Station, Vermont would be forced to fill the gap in power supply with higher-emission sources such as coal or gas power. One study found that Vermont's carbon dioxide emissions would increase by about 2 million tons per year if the Vermont Yankee Station were shut down. Kee, Ex. 10 at 21; *see also* Kee, Ex. 7 at 12-8. While Vermont may, in the long term, develop enough renewable energy sources to help meet this need, the GDS Study concluded that "[i]n the foreseeable future, however, these sources will not be available in sufficient quantity as is currently provided through Vermont's share of the Vermont Yankee facility." Kee, Ex. 7 at 12-5. Thus, a shutdown of the Vermont Yankee Station will almost certainly mean increased greenhouse gas emissions.

In May 2008, Vermont released, for public review, its draft of a third Comprehensive Energy Plan ("CEP"), designed to "highlight the growing array of overlapping and interrelated initiatives of the Administration and state agencies, the Vermont General Assembly, Vermont's educational institutions, the Federal Government, federal and state regulators, the community of states and provinces in the Northeast U.S. and eastern Canada, and Vermont communities." Kee, Ex. 12 (Vt. Dep't of Pub. Serv., *Vermont Comprehensive Energy Plan 2009 and Update to the 2005 Twenty-Year Electric Plan* (May 2008)), at xi. As part of that CEP, Vermont conceded the importance of the Vermont Yankee Station to Vermont's commitment to reduce its carbon emissions:

At present, Vermont is at an advantage with respect to our carbon profile. Vermont has the smallest carbon footprint of any state in the U.S. and has one of the smallest on the basis of per capita emissions. Despite Vermont's current advantage, *the state may be particularly challenged to maintain or improve upon that profile relative to other states.* As noted below, *Vermont's advantage is due in significant part to the existence of contracts for electricity with Vermont Yankee and Hydro-Quebec.* The Vermont Yankee

contracts are due to expire in 2012 and a significant share of the Hydro-Quebec contracts by 2016.

Id. at I-7 (emphasis added, footnotes omitted).²² Absent the Vermont Yankee Station, those imports would necessarily increase, thus increasing the state's carbon footprint dramatically. In addition to the negative environmental effects from this increase in carbon emissions, Vermont will also lose some or all of the approximately \$3 million in annual revenue it currently receives from the RGGI cap and trade program, and Vermont electric utilities may see higher RGGI-related costs that would be passed on to utility customers, depending on the source that replaces the electricity now produced by the Vermont Yankee Station. See ¶¶ 61-62.

F. No Environmental Benefit From Shutdown.

The GDS Study engaged in a lengthy and detailed analysis of the potential environmental impact of continued operation of the Vermont Yankee Station past 2012. Relying upon, *inter alia*, the NRC's independent review of the environmental impacts of continued operation of the plant, the GDS Study addressed the effects of plant releases, withdrawal from and discharge to the Connecticut River, waste management and storage, maintenance of transmission lines on air and water quality, natural communities and habitat, the effects of climate change on the hydrology of the area, and seismic activity on soil stability and conditions. See, Ex. 7 at 9-1.

The GDS Study concluded that environmental impact from continued operation would be minor. For example:

- “Air emissions, especially CO₂, are limited since the facility does not combust fossil fuel to generate electricity. Similarly, hazardous air contaminants released in cooling tower drift are expected to be low and within permit limits. Radioactive emissions are expected to remain similar to current levels.” *Id.* at 9-51.

²² As explained *supra*, at 50-51, power purchased from Hydro Quebec to replace the lost capacity of the Vermont Yankee Station is likely to be more expensive compared to the situation where the Vermont Yankee Station remained operational.

- “No impacts from cooling tower drift on crops or native plants are expected. No federally or state-listed species would be impacted. . . . Thermal discharge of water to the river is not expected to impact organisms through heat shock or present a thermal barrier to migrating American shad or Atlantic salmon.” *Id.* at 9-51 & 9-52.
- “Seismic shaking would not cause any damage to facilities at the VYNPS, provided that all upgrades, refurbishments, and new construction conform to current (and future) federal requirements and any appropriate State of Vermont requirements. It is unlikely that an earthquake of significant intensity and magnitude to trigger liquefaction would occur.” *Id.* at 9-52.
- “High-level nuclear waste stored in the ISFSI would not pose environmental concerns.” *Id.*

Although a tritium leak was identified subsequent to the GDS Study, ENVY and ENOI appropriately addressed the issue. According to a study commissioned by Vermont’s DPS, “ENVY’s activities related to locating and excavating the AOG [Advanced Off-Gas] leaks were timely, appropriate, and planned effectively,” Ngau, Ex. 29 (Nuclear Safety Associates, *Supplemental Report To The Comprehensive Reliability Assessment Of The Vermont Yankee Nuclear Facility* (Apr. 30, 2010) (redacted version)), at 94, and the leak “did not affect the overall reliability of the plant,” *id.* at 95. Moreover, both the NRC and Vermont’s State Nuclear Engineer determined that the leak had had no effect on public health, safety, or the off-site environment, and the Vermont Agency of Natural Resources (“ANR”) determined that the level of tritium released to the off-site environment was orders of magnitude below ENVY’s federal Clean Water Act permit, which ANR administers. Ngau, Ex. 20 (Letter from Darrell J. Roberts, Director, Division of Reactor Safety, to Michael Colomb, Site Vice President, Entergy Nuclear Operations, Inc. (Apr. 16, 2010)); Ngau, Ex. 31 (Vt. Pub. Serv. Bd., Dkt. No. 7600, Prefiled Testimony of Richard Spiese, Environmental Analyst, Agency of Natural Resources (July 2, 2010)), at 5; Ngau, Ex. 31 (Vt. Pub. Serv. Bd., Dkt. No. 7600, Testimony of Uldis Vanags, Vermont State Nuclear Engineer (July 2, 2010)), at 266:3-12.

Accordingly, the public's interest in the environment would not be harmed by a preliminary injunction allowing the Vermont Yankee Station to continue operating during the pendency of this litigation. Moreover, allowing continued operation of the Vermont Yankee Station provides affirmative benefits to the environment in the form of lower greenhouse gas emissions.²³

G. Loss Of Charitable Contributions.

If the Vermont Yankee Station is shut down, the significant contribution of the Vermont Yankee Station to local and regional charities will be lost. More than 100 local non-profit organizations received contributions from ENVY in 2010, with more than \$300,000 dollars in total 2010 contributions. See ¶ 78 & Exs. 27-28. Although it did not quantify the impact, the GDS Study noted that:

Entergy VY has been a contributor to local charities and expects to continue to do so. ... VY estimates based on historical experience that it will donate an average of \$380,000 per year, or \$7.6 million total over 20 years. The Department of Public Service has verified that VY is a significant benefactor of several local charities including United Way.

Kee, Ex. 7 at 11-30.

H. Yankee Rowe Experience.

In assessing the harm to the public from a closure of the Vermont Yankee Station, the Court also should consider the relevant experience of other locations impacted by the shutdown of a nuclear power plant. For example, the nearby town of Rowe, Massachusetts, was dramatically harmed by the 1992 closing of the Yankee Rowe nuclear power plant. A University of Massachusetts at Amherst study provides a preview of what may happen to the community surrounding VYNPS. Among the findings of that study were:

²³ Thus, any environmental rationale that Defendants might assert *post hoc* in an attempt to avoid federal AEA preemption would be a pretext for Vermont's true safety rationale.

- “Generally, there was a somewhat wistful feeling in Rowe that life just wasn’t the same any more. This was not simply a dollars-and-cents matter of jobs, taxes, and the economic base, but rather a loss of the community’s strong sense of purpose.”
- Within 2 years of the closure, 46 percent of the plant’s workforce had left the plant; many had moved to other nuclear power plants in distant states.
- The town’s retail businesses suffered; the supermarket most used by Rowe residents closed; a local resident withdrew his proposal to build a new restaurant.
- The revenue loss directly affected town services; Rowe cut off funding for ambulances and schools.
- Local assessors estimated a \$6 million decline in property values, with the closing of Yankee Rowe as the major reason; Rowe and its neighboring towns had to raise property taxes considerably.

Kee ¶¶ 80-81 & Ex. 29 (John R. Mullin & Zenia Kotval, *The Closing of the Yankee Rowe Nuclear Power Plant: The Impact on a New England Community*, UMASS Amherst Landscape Architecture & Regional Planning Faculty Publication Series (1997)).

Similarly, the closure of the Maine Yankee station in 1997 confirms the impact on jobs and tax revenue that can be expected from a premature shutdown of the Vermont Yankee Station. Maine Yankee was a significant source of tax revenue (estimated at 96 percent) for Wiscasset, Maine. Kee ¶ 83. In 1998, a year after Maine Yankee’s closure, the amount of annual tax revenue from Maine Yankee dropped to about \$6 million from nearly \$13 million prior to closing, with the lost tax revenue made up by a combination of higher local taxes and spending cuts. *Id.* Maine Yankee had 480 full-time employees when it was operating; this was reduced to 166 by 1998. *Id.* After the closure, the town had to cut its police force and raise taxes on residents, even as people moved out. As one town official put it: “The impact in the town was pretty dramatic. . . . We’re still experiencing difficulties and will for some time.” *Id.* ¶ 83 (discussing closure of Maine Yankee). This Court should avert any similar dramatic consequences here by issuing the preliminary injunction.

Hearing Requested

Plaintiffs respectfully request a hearing on this motion.

Conclusion

Plaintiffs respectfully request that this Court grant their Motion for Preliminary Injunction.

Dated: Burlington, Vermont
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